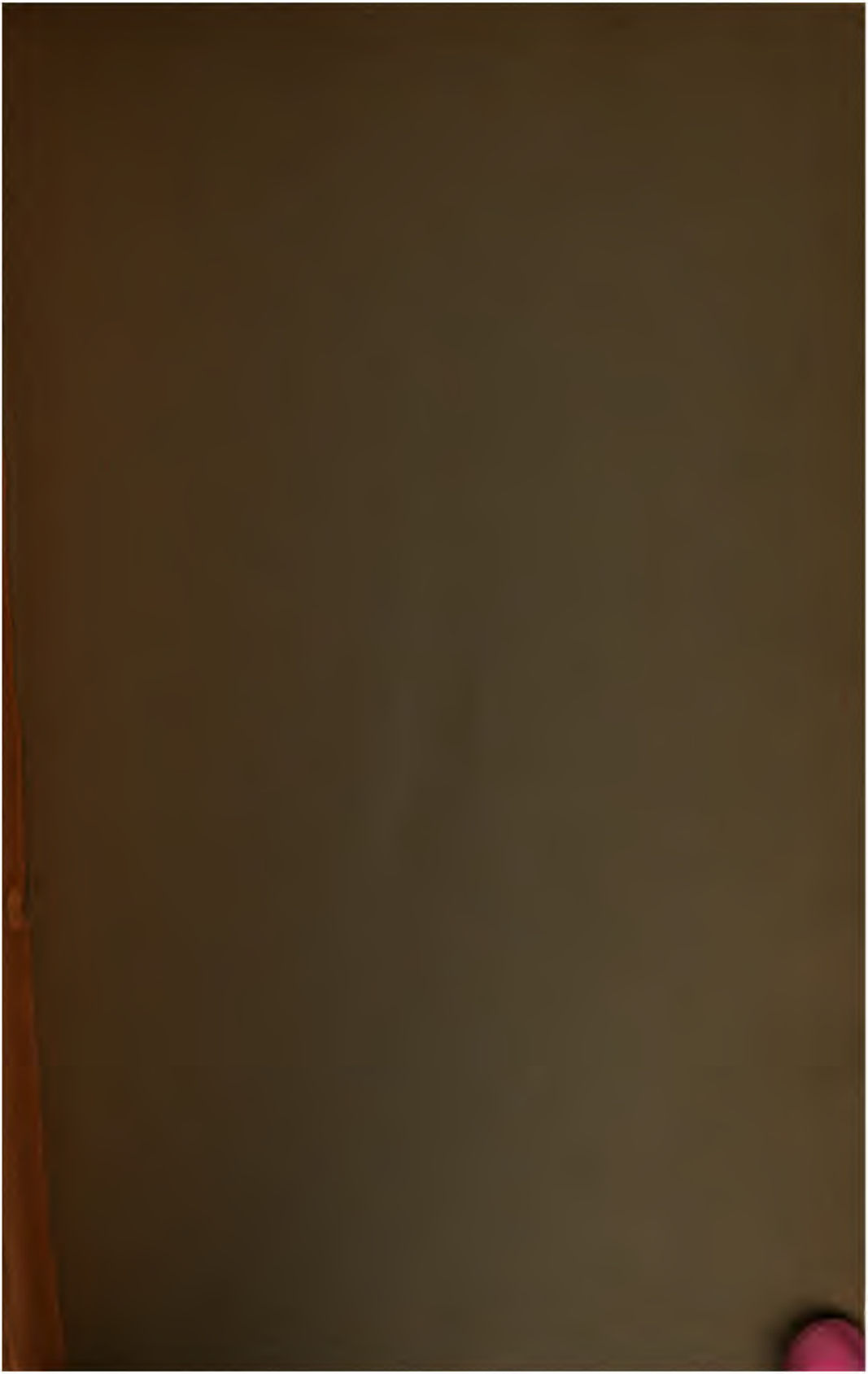

CONSULAR CASES AND OPINIONS

FROM THE

DECISIONS OF THE ENGLISH AND AMERICAN COURTS

AND THE

OPINIONS OF THE ATTORNEYS GENERAL

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PREFACE

This book aims to furnish a convenient collection of the British and American cases and opinions relating to consuls. A few important cases have been given in full. In general, however, only the opinion or an extract relating to consuls is given. In certain instances where the case appeared of little importance or was of great length, a brief summary enclosed in parenthesis has been made. All extracts are clearly indicated.

The Opinions of the Attorneys General relating to consular affairs have been added because of their judicial nature and the convenience of having them in one volume. Few students and lawyers have access to the twenty odd volumes which contain the opinions published since the office was established. Another reason for including these opinions or decisions of the head of the Department of Justice was to reproduce the very remarkable opinions of Caleb Cushing. He understood the real nature of the consular office and fifty years of study and experience have made it possible to add but little to what he wrote. If this collection can make his opinions and conceptions of the consular office more widely known and appreciated, it will be justification enough for the publication.

The indexes to the Revised Statutes and Statutes at Large are taken from the Index Analysis of the Federal Statutes of Scott and Beaman and the Consolidated Index of Federal Statutes, so as to gather in a small compass what those ponderous volumes contain about consuls. The Consolidated Index has not been distributed and only a few copies are in existence.

Those who wish to make a study of any section of the statutes are referred to The Federal Statutes Annotated and to the tables of repeals and amendments contained in Scott and Beaman's Index.

In the compendium at the end an attempt has been made to give extracts and references in such a manner as to make the important points in the cases and opinions stand out. To this end the classification, already explained in Le Consul * has, with some slight modifications, been followed.

Consular Functions as the foundation and object of the consular office and the reason for its existence come first. The Consul's Func-

*Le Consul (Pedone), Paris, 1909.

tions are themselves classified according as the consul's reason for acting is primarily the direct interest of a citizen or the general interest of the sending state, and this latter division is again divided into Representative, Administrative, and Judicial Functions.

Consular Immunities, making possible the discharge of the consular office within the receiving state, follow logically.

The Organization of the service enables the government of the sending state to choose, retain, and direct its agents.

Certain Legislation on the part of the sending state is necessary to give adequate protection to consuls and compel its nationals to comply with the regulations which the consul is directed to carry out.

Consuls must receive the consent of the receiving state before entering upon the discharge of their duties, and before they can be entitled to the immunities granted by treaties and international law.

It only remains to examine the Termination of consular establishments and the consular office to be in a position to understand the true nature of the consul and to give a Definition.

Such is in outline the system of classification of the compendium. The index will make it possible to find the references to any particular question without understanding the logic of the classification.

The translation of the Regulations Adopted by the Institute of International Law has been made for those who do not read French. Every effort has been made to adhere as closely as possible to the original except that here, as elsewhere, the terms *Receiving State* and *Sending State* have been employed because of the great convenience of so doing. The term *Consular Agent* to designate merchant consuls (Consules Electi) is gaining general acceptance. Perhaps Consuls of Career (Consules Missi) might be designated as *Despatched Consuls* where spoken of in contradistinction to Consular Agents. A further beneficial distinction might be made by designating as *Immunities* those rights and exemptions which the receiving state grants consuls of the sending state, and *Privileges* any privileged treatment, favor or exemption which the sending state accords its own consuls.

An effort has been made to exclude all cases and opinions referring to the exercise of exterritorial jurisdiction, because this branch of the consular service of the different countries has been more carefully studied, and also because of its peculiar nature. It may be a question whether consular exterritorial jurisdiction is destined to disappear entirely. The indications at present, however, seem to point to its abolition in all states of any importance.

When referring to the cases contained in this volume it must be borne in mind that any decision may have been reversed in some later case or rendered inapplicable by legislative action.

No distinction between the obiter dicta and the holdings of the courts has been attempted, but a list of citations has been added which will aid in reaching a conclusion as to what was really held, where the case presents any difficulties of interpretation.

I would express my thanks and my great indebtedness to Mr. Herbert Putnam, Librarian of Congress, and to Mr. Middleton G. Beaman, Law Librarian, for the facilities which they have so kindly placed at my disposal.

WASHINGTON, D. C., JULY, 1909.

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Abb. Adm.	Abbott's Admiralty, United States District Court.
Add.	Addams, Ecclesiastical Courts.
Allen	Allen, Massachusetts Supreme Court.
Am. St. Rep.	American State Reports.
Aspin.	Maritime Cases, New Series (Aspinall) Admiralty.
Atl.	Atlantic Reporter.
Atty. Gen.	Opinions of the Attorneys General.
Barb.	Barbour, New York Supreme Court.
Bay	Bay, South Carolina, Various Courts.
Bee	Bee's Admiralty, United States District Courts.
Ben.	Benedict, United States District Court.
Binn.	Binney, Pennsylvania Supreme Court.
Blatchf.	Blatchford, United States Circuit Court.
Blatchf. & H.	Blatchford and Howland's Admiralty, United States District Court.
Burr.	Burrow, King's Bench 178-182.
Cal.	California Supreme Court.
Car. & P.	Carrington and Payne's Reports.
Crabbe	Crabbe, United States District Court.
Cranch	Cranch, United States Supreme Court.
Ct. Cl.	Court of Claims, United States.
Curt.	Curtis, United States Circuit Court.
Curt. Eccl.	Curteis Ecclesiastical.
Dall.	Dallas, United States Supreme Court and Circuit Courts, and Courts of Pennsylvania.
De G., M. & G.	De Grex, McNaughten & Gordon.
Dod.	Dodson, Admiralty.
Dutch.	Dutcher, New Jersey Supreme Court.
East	East, King's Bench.
East.	Eastern Reporter.
Edwards	Edwards, Admiralty.
Eng. Rep.	English Reports, Full Reprint.
Esp.	Espinasse's Reports.
Fed. Cases	Federal Cases.
Fed. Rep.	Federal Reporter.
Ga.	Georgia Supreme Court.
Gilp.	Gilpin, United States District Court.
Green	Green (J. S.), New Jersey Supreme Court.
H. & M.	Hemmming and Miller.
Hag. Adm.	Haggard, Admiralty.

Hill	Hill's Reports, New York.
Holmes	Holmes, United States Circuit Court.
How.	Howard, United States Supreme Court.
Johns.	Johnson, New York Supreme Court and Court of Errors.
L. Ed.	Layers' Co-operative Edition of United States Supreme Court Reports.
L. J. Adm.	Law Journal, Admiralty.
L. R. P. C.	Law Reports: Privy Council Appeal Cases.
L. R. P. & D.	Law Reports, Probate and Divorce Cases.
L. T. N. S.	Law Times Reports, New Series, All the Courts.
La. An.	Louisiana Annual, Louisiana Supreme Court.
Law Rep.	Law Reporter (Boston).
Leg. Int.	Legal Intelligencer.
Litt.	Littell, Kentucky Court of Appeals.
Low.	Lowell, United States District Court.
Lush.	Lushington, Admiralty.
McAllister	McAllister, United States Circuit Court.
Mas.	Mason, United States Circuit Court.
Mass.	Massachusetts Supreme Court.
Man. & Sel.	Maule and Selwyn, King's Bench 214-219.
Misc.	New York Miscellaneous Reports.
Moore	Moore's International Law Digest.
Moore Int. Arb.	Moore's International Arbitrations.
N. E.	Northeastern Reporter.
N. J. Law.	New Jersey Supreme Court of Errors and Court of Appeals.
N. W.	Northwestern Reporter.
N. Y.	New York Court of Appeals Reports.
N. Y. Supp.	New York Supplement.
Newb.	Newberry's Admiralty, United States District Courts.
Nott. & McC.	Nott and McCord, South Carolina Constitutional Court.
Olc.	Olcott, United States District Court.
P. D.	Probate Division, Law Reports.
Pa.	Pennsylvania Supreme Court Reports.
Pac.	Pacific Reporter.
Paine	Paine, United States Circuit Court.
Pet.	Peter's, United States Supreme Court.
Pet. Ad.	Peter's Admiralty Decisions, United States District Court.
Phila.	Philadelphia Reports.
Phillim. (2d)	Phillimore International Law, 2d Edition.
Pick.	Pickering, Massachusetts Supreme Court.
Pr. & Div.	Law Reports: Probate and Divorce.
Rob.	Robinson, Louisiana Reports.
Rob. C.	Robinson, C. Admiralty Reports.
Rob. W.	Robinson, W. Admiralty Reports.

LIST OF ABBREVIATIONS

Ry. & M.	Ryan and Moody's Reports.
S. E.	Southeastern Reporter.
S. & R.	Sergeant and Rawle's Reports, Pennsylvania.
Sand.	Sandford, New York City Superior Court.
Sawy.	Sawyer, United States Circuit and District Courts.
So.	Southern Reporter.
Sprague	Sprague's Decisions, United States District Court.
Sumn.	Sumner, United States Circuit Court.
Sup. Ct. Rep.	Supreme Court Reporter.
Super. Ct.	Superior Court Reports, New York.
Taney	Taney's Decisions, United States Circuit Court.
Taunt.	Taunton's Law Reports, Common Pleas.
Tex. App.	Texas Court of Appeals Reports.
Tex. Civ. App.	Texas Civil Appeal Reports.
U. S.	United States Supreme Court Reports.
U. S.	United States.
v.	versus or against.
Ves. & Bea.	Vesey and Beames, Chancery Reports.
Wall.	Wallace, United States Supreme Court.
Ware	Ware, United States Circuit Court.
Wash. C. C.	Washington, United States Circuit Court.
Whart.	Wharton, Pennsylvania Supreme Court.
Wheat.	Wheaton's, United States Supreme Court.
Wis.	Wisconsin Supreme Court.
Woodb. & M.	Woodbury and Minot, United States Circuit Court.

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REGULATIONS RELATING TO IMMUNITIES OF CONSULS AS ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW, IN ITS SESSION OF SEPT. 26, 1896.*

PRELIMINARY CHAPTER

Article 1.—The title of consul belongs only to those agents of the foreign service, who belong to the state they represent, and who exercise no functions other than those of consul. (consules missi)

Hereafter, the following classes shall be designated as consular agents:

(a) Consuls, who are nationals, that is citizens or subjects of the sending state, but who exercise other functions or have some other calling;

(b) Consuls, who by nationality, belong either to the state in which they are commissioned, or to some state other than the sending state, without distinguishing between those who exercise and those who do not exercise, other functions or callings.

Art. 2.—Consuls and consular agents are subject to the laws and territorial jurisdiction, save for the exceptions specified under chapters I and II, below.

Art. 3.—To entitle consuls and consular agents to be admitted and recognized as such, they must present their patent or commission; on the production of which, they will receive their *exequatur*.

Upon the presentation of the *exequatur*, the authority presiding over the district, in which the said agents are to be located, will give the necessary orders to the other local authorities, in order that they may be protected in the exercise of their functions, and that the immunities, exemptions, and privileges, conferred by these regulations, may be guaranteed to them.

In the event that the government of a country should deem it advisable to withdraw the *exequatur* from a consul, it should previously inform the government to which the consul belongs.

*[Translated from the original in French.—Ed.]

CHAPTER FIRST

Consuls

Art. 4.—Consuls enjoy personal immunity, under the conditions and within the limits specified in articles 5, 6, 7, and 8, below.

Art. 5.—They are not amenable to the local courts for acts which they perform in their official capacity and within the limits of their powers. Exceptions to this rule must be agreed upon in advance and defined by treaty.

If an individual considers himself injured by the act of a consul, done in the discharge of his duties, he shall address his complaint to the government of the country, which will take it up, if there is reason to do so, through diplomatic channels.

Art. 6.—Except in the case specified in article 5, above, consuls are amenable to the courts of the country, in which they exercise their functions both as regards civil and criminal questions.

Nevertheless, every proceeding directed against a consul is suspended until his government (sending state), duly notified through diplomatic channels, shall have been put in a position to confer with the government of the country (receiving state) so as to reach an adequate settlement of the incident.

Such previous notice is not necessary:

(1) In case of outrageous offences or crimes;

(2) In property suits (suits in rem), in which are included suits for possession, whether relating to personal property or to real estate situated in the country itself (receiving state);

(3) When the consul himself has begun the litigation or accepted suit in the courts of the receiving state.

Art. 7.—In no case may consuls be arrested or detained, except for grave infractions of the law.

Art. 8.—They are not compelled to appear as witnesses before the local tribunals. Their testimony must be taken at their residence by a magistrate appointed *ad hoc*.

In exceptional cases, where the appearance of the consul in person before the magistrate exercising civil or criminal jurisdiction is considered indispensable, and he refuses to accede to the invitation addressed to him, to appear before the competent judge, the government of the receiving state should have recourse to diplomacy.

Art. 9.—The official residence of a consul and the premises occupied by his office and papers are inviolable.

No administrative or judicial officer may invade them, under any pretext whatsoever. If an individual, pursued by the officers of the law takes refuge in the consulate, the consul is bound to deliver him up on the simple demand of the authorities.

Art. 10.—In order specially to insure the inviolability of the consular archives, the foreign agent (consul), should make use of the diplomatic mission to transmit to the authorities of the county (receiving state) a paper describing the premises composing the office of the consulate. This should be done at the time the consul enters upon the discharge of his functions and whenever the files (chancellerie) are transferred from one building to another or any important change is made in the arrangement of the office (chancellerie).

The above-mentioned statement describing the arrangements of the consulate shall be verified each time by an officer of the receiving state.

Art. 11.—Consuls should refrain from placing among their archives, and in the rooms of their office, documents and objects not connected with their service.

The offices of the consulate, if distinct from the rooms serving as the abode of the consul, may be installed in the same building.

Art. 12.—If the consul refuses to deliver up documents in his possession when required to do so by the judicial authorities of the country, the administrative authority shall have recourse to the government of the country, who will take the matter up, if there be occasion, through diplomatic channels.

Art. 13.—Consuls are exempt from the payment of: (1) direct personal taxes, and sumptuary taxes; (2) general taxes upon their fortune whether upon the capital or income; (3) imposts of war.

Art. 14.—Consuls are permitted to place above the outside entrance of the consulate the arms of their country, with the inscription: "Consulate of ....."

They may on public occasions display the flag of their country upon the building in which the consulate is located, unless they reside in the city where their government is represented by a diplomatic mission.

They are likewise authorized to raise the flag of their country upon the boats they use in the exercise of their functions.

Art. 15.—Consuls are permitted to correspond with their government and with the political mission of their country by telegraphic despatches in cipher or by means of messengers provided with a passport *ad hoc*.

It is likewise permissible for them to entrust their correspondence to the captains of vessels of their nationality at anchor in the harbor of their place of residence.

In case of an epidemic, the disinfection of letters intended for consuls takes place in the presence of a consular delegate.

Art. 16.—In event of the decease or the unlooked for disability of the consul, the consular officer of highest rank after him shall be considered to have the right to carry on the consulate. He is obliged, however, in due course to communicate to the local authority, the official act, which confirms him in his provisional incumbency.

To this intent, it is the duty of the consul to present to the local authority the officer designated contingently to replace him *ad interim*.

This officer shall, during his incumbency, enjoy the immunities and privileges accorded to consuls by these regulations.

Art. 17.—There is no distinction, as regards immunities, between consuls-general, consuls, and vice-consuls.

It is to be understood that agents of this last category, in so far as they are in charge of vice-consulates, must satisfy the conditions as to nationality, and the other conditions indicated (required) in the first paragraph of article first of these regulations.

In official ceremonies to which they are invited, consuls-general, consuls, and vice-consuls take precedence according to their rank, and in each rank, according to the date of their entrance upon the discharge of their functions.

CHAPTER II

Consular Agents

Art. 18.—When civil or criminal suits are instituted against consular agents, the local courts shall be competent to take cognizance of them directly, except in case it shall be established that the said agents have acted in their official capacity.

Art. 19.—Consular agents are exempt from taxes affecting specially the building or part of the building assigned to their consular office.

With this exception, they are subject to other imposts, whether national or local.

Art. 20.—Articles 10, 11, paragraph 1st, 12 and 14 apply to consular agents, with this difference as regards article 14, that the

coat of arms, placed over the street entrance to their office, shall bear the inscription: "Consular Agency of ....."

The office of consular agents, including the room in which the consular archives are kept, must always be separate from their business offices.

Art. 21.—Consular agents may correspond directly, upon official business, with the administrative and judiciary authorities of their respective districts.

Resolution Adopted by the Institute in the Same Session

The Institute having adopted the Regulations regarding immunities of consuls, expresses the wish that governments, whose functionaries are likely to be in a position to be benefited by them, will exercise the greatest care in the choice of such functionaries, that they may be worthy in all respects of the immunities above specified.

ADAMS v. STATE, (1885, U. S.)
19 Tex. App. 250.
Willson, Texas Court of Appeals.

[Consul qualified to take depositions to be used in criminal cases, by reason of the application of articles of the R. S. art. (2226) and articles 762-764 of the code of criminal procedure.—ED.]

ADOLPH, THE, (1835, Great Britain)
3 Hag. 249.
Sir John Nicholl, High Court of Admiralty.

(Extract) In that case (Kammerhavie, 1 Hag. A. R. 62) there was the certificate of the consul, and the master gave his consent: here there is no one to consent. I cannot make any order.

ADOLPH, THE, (1851, U. S.—France)
1 Curt. 87; Fed. Cases 86.
Curtis, Circuit Court.

(Extract) We deem it sufficient for this particular purpose, that M. Gouraud is the vice-consul of France; and that French citizens are interested in these proceeds. It is true, he had not received his *exequatur* when he filed his petition; and if this were a suit instituted by him, and depending on his official character when brought, it must fail. But we do not consider the proceeding at all analogous to a suit, or even to a petition for the execution of a decree. It is rather in the nature of a suggestion, made in writing to the court, that one of its officers has not discharged his official duty;...

ADUTT, IN RE, (1893, U. S.—Austria-Hungary)
55 Fed. Rep. 376.
Jenkins, Circuit Court.

[Extradition proceedings may be commenced by consuls.

It is not necessary that the complainant should swear positively in the jurat that he is consul.

Criticises rights allowed consul in extradition proceedings.—ED.]

AGINCOURT, THE, (1877, Great Britain)
2 P. D. 239; 47 L. J. Adm. 37.
Sir Robert Phillimore, Court of Appeal.

[Court directed that Argentine consul be notified of action against Argentine vessel.

On his refusing to intervene action was dismissed.—ED.]

ALBRETCHT v. SUSSMAN, (1813, Great Britain)
2 Ves. & Bea. 327; 35 Eng. Rep. 342.
Vice-Chancellor, Chancery.

(Extract) I am of opinion, fortified by having recourse to those best qualified to inform me, that, if a consul, or a person having even higher privileges, residing in an enemy's country, not content with acting in that character, embarks in mercantile transactions, his individual character is not merged in his national character, which cannot protect him from the consequences of those transactions.

ALEXANDRA, THE, (1906, U. S.)
104 Fed. Rep. 904.
Brawley, District Court.

[Expressed opinion that consul would not be competent to take depositions *de bene esse;* they not being "ordinary notarial acts,[1] such as a notary public could perform simply by virtue of his office."

Cites Cortes Co. v. Tannhauser, 18 Fed. Rep. 667. See Bischoffscheim v. Baltzer, 10 Fed. Rep. 4, contra.—ED.]

ALICE, THE, (1882, U. S.)
12 Fed. Rep. 923.
Locke, District Court.

1. EVIDENCE.
That party had but one bill of lading and did not deem it prudent to incur the risk of a sea voyage from Antwerp, when it might be needed in more important suit, not deemed sufficient to admit in evidence a paper certified by United States consular certificate to be a true copy.

2. CONSULAR CERTIFICATE.
A consular certificate is not evidence.

In Admiralty.

LOCKE, D. J. This is a suit for damages and possession of cargo. The libellant presents by his proctor a paper certified by the United States consul at Antwerp to be a correct copy of an original bill of lading in the possession of Weber, the libellant, and asks that it be accepted as evidence in lieu of the original, upon the grounds that "libellants have but one copy of the original bill of lading, and they deem it best not to expose that to the risk of long sea voyages before they can judge where their principal claim must be enforced. "This refers to the fact of a fraudulent shipment and false bills of lading

[1] The statute § 1750 says "any notarial act which any notary public is required or authorized by law to do within the United States."

which have appeared in other suits against the same property, and (924) which have presumably given the libellants (they being consignees of a portion of the cargo and having made large advances thereon) an action against the shipper; and as the amount which can be recovered from this suit is but trifling when compared with that involved, the reason for withholding the original appears plausible; but when more closely examined I am not of the opinion that it offers such an excuse as would justify such a wide departure from the general rule of requiring primary evidence as permitting the introduction of the paper presented would require.

It is much better that private interests and individual cases suffer delay, rather than that the rules of practice and evidence established by the accumulated wisdom of generations in successive decisions should be easily broken down or ignored; and if the libellants have the originals, the production of them can be made but a question of time, notwithstanding other interests. The general rule which requires the best evidence, namely, the introduction of the original documents embodying contracts, has, it is true, certain exceptions; but in every case such exception is based upon the inability of the party to procure the original; and this has been so repeatedly affirmed, and so conclusively established, that it can but be recognized as binding. The certificate attached to the copy states, and the libellants acknowledge, that the original is in their possession, and this takes the case from the rule of exceptions. I have been referred to no case, nor have I been able to find one, where the inconvenience of parties or prospect of an original being required in another suit has been considered sufficient reason for the acceptance of a copy in evidence.

International commerce is of too great importance to have the possibility of success of fraud made any greater by breaking down any of the well-established protections for such documents as bills of lading or of exchange; and although there are no suspicious circumstances connected with this case, nor have I personally any doubt of the integrity and validity of the libellant's cause, I do not consider that they have brought themselves within the rule which would authorize the acceptance of secondary evidence. Renner v. Bank of Columbia, 9 Wheat. 581; Sebree v. Dorr, Id. 558; Greenl. Ev. § 84, and note; Hart v. Yunt, 1 Watts, 253; U. S. v. Reyburn, 6 Pet. 352; Cornet v. Williams, 20 Wall. 226; U. S. v. Lamb, 12 Pet. 1; Stephen, Ev. arts. 66, 67. There is another point which would rule out the copy as authenticated were the one considered insufficient. It has been conclusively decided in the courts of the United States that a consular certificate (925) cannot be accepted as evidence except where it has been made such by statute, (Levy v. Burley, 2 Sumn. 355;

Church v. Hubbard, 2 Cranch 187; U. S. v. Mitchell, 2 Wash. C. C. 188;) and although the acts of August 18, 1856, and of January 8, 1869, have added some force to consular certificates, and given consuls new powers in taking depositions, the law has not been changed in the points in question.

The application to admit the testimony must be denied, but time will be granted to procure the original of the bill of lading, or make a more satisfactory accounting for its absence.

ALNWICK, THE, (1904, U. S.—Great Britain)
132 Fed. Rep. 117.
Adams, District Court.

[To what extent U. S. courts will exercise jurisdiction in suits for seamen's wages.

Will do so in case of American citizens, or in case involving application of statutes of U. S. This case involved the prepayment of wages by officer of British ship to Americans.—ED.]

AMALIA, THE, (1880, U. S.—Sweden)
3 Fed. Rep. 652.
Fox, District Court.

FOX, D. J. (Extract) This libel is instituted by the second mate, steward, and all the seamen, praying to be discharged from further service in this bark, and for the payment of their wages, on account of a short allowance of provisions on a voyage of 124 days, from Alexandria, Egypt, to this port, and (653) also on account of ill-treatment by the officers of the ship. This vessel is under the Swedish flag, hailing from Hernosand, in Sweden. The master is a Swede. Some of the libellants are citizens of that country, while others are subjects of Denmark and Prussia. Some of the crew were shipped at Hernosand, and some in New York, all for a two-year voyage, (which time has not yet expired,) and until the vessel's return to Sweden. There being no consul or other representative of Sweden within the jurisdiction of this court, upon reading the libel it was deemed proper to grant process against the ship, then in the harbor or Portland. On the return day the master appeared and presented a preliminary objection to the court's further proceeding in the cause, for the reason that the ship was a foreign vessel, and her crew must be taken as belonging to the nationality of her flag, and that under such circumstances the district court should not interpose, in a controversy of this description, between a foreign ship and her crew.

In all differences between officers and crew of a foreign vessel,

which have been presented to this court, the court has heretofore, in every instance, declined to assume jurisdiction whenever there has been within the district any representatives of the government to which such ship belonged, and has invariably remitted to such representative all such controversies for his determination. In all such cases the court has recognized the rule announced by the privy council in *The Nina,* 2 L. R. P. C. 39, that the nationality of the vessel, and not the nationality of any one of her crew, asking the interposition of the court should regulate the action of the court; and all of the crew of this ship, for the purpose of this investigation, must be deemed Swedish subjects, notwithstanding it appears that some of them are in fact citizens of other nationalities.

It cannot admit of question that the district court, unless restricted by some treaty stipulation, has jurisdiction, in a case for wages, against a foreign vessel, and that the exercise of such jurisdiction is discretionary. In the exercise of such discretion the allegations found in this libel required of the court, in the absence of any Swedish representative, to (654) investigate the cause so far as to ascertain whether the facts and reasons alleged for the crew's discharge were established by the evidence. The cause, therefore, was allowed to proceed to a hearing, and at the close of the testimony of the libellants the attention of the court was first called to the thirteenth article of the treaty between Sweden and the United States, of July 4, 1827, in 8 U. S. St. 346, 352. By this article it was stipulated "that each country should have the right to appoint consuls, vice-consuls, etc., in the commercial ports and places of the other country," and that such consuls, etc., "shall have the right as such to sit as judges and arbiters, in such differences as may arise between the captain and crews of the vessel belonging to the nation whose interests are committed to their charge, without the interference of the local authorities."

This court is bound to recognize and obey this provision of the treaty as completely as if the same were contained in an act of congress, and the question which arises is whether, there being no consul or other officer of Sweden within this jurisdiction, the nearest being a vice-consul at Boston, this court is, by this provision of the treaty, debarred from exercising its authority in the present case. It seems quite clear to me that the court is not thus ousted of its jurisdiction. The purpose of this provision was to provide proper means of redress for the parties mentioned in the treaty, when difficulties should occur between them, and it was certainly judicious that such questions should be decided by the consul, or other officer of their respective countries conversant with the language of the disputants, and who

may well be supposed to be acquainted with the laws and customs which should determine their respective claims; but, whenever the parties are in such a position that they cannot obtain the services of such an officer, can it be that it was the design of the treaty to leave them remediless, and to deprive the local tribunal of all authority to afford any redress, however urgent the occasion may be therefor?

If a Swedish vessel should be libelled in this court for supplies furnished here, for which she is liable, and is afterwards (655) sold by a decree of the court, can it be that the crew, by this provision of the treaty, are prohibited from proceeding for the recovery of their wages against the surplus which may remain in the registry, and that the court cannot decree the payment therefrom of their respective claims for wages, but must, if claims of subordinate rank are presented by our own citizens, allow such claimants to absorb the surplus, without power to afford the seaman any redress? I hold that a court of admiralty would require, in a treaty, the most positive, absolute prohibition against assuming jurisdiction in such a case, and would insist on language which would not admit of any doubtful signification, before it would acknowledge that its authority to protect the seaman was thus abrogated. If in any case the power still remains in the court, and it has authority to act when there is no consul within its jurisdiction, the authority must exist in all such cases; and it is only a question of judicial discretion whether the circumstances of any case are such as to require the court to interpose and take cognizance of the dispute.

ANNE, THE, (1818, U. S.)
3 Wheat. 435; 5 Moore 94.
Story, Supreme Court.

The captors are competent witnesses upon an order for further proof, where the benefit of it is extended to both parties.

The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, collusive, or within neutral territory.

It is not competent for a neutral consul, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country.

Quaere, Whether such a claim can be interposed, even by a public minister, without the sanction of the government in whose tribunals the cause is pending.

A capture, made within neutral territory, is, as between the belligerents, rightful; and its validity can only be questioned by the neutral state.

If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

Irregularities on the part of the captors, originating from mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.

APPEAL to the circuit court for the District of Maryland.

(436) The British ship Anne, with cargo belonging to a British subject, was captured by the privateer Ultor, while lying at anchor near the Spanish part of the Island of St. Domingo, on the 13th of March, 1815, and carried into New York for adjudication. The master and supercargo were put on shore at St. Domingo, and all the rest of the crew, except the mate, carpenter and cook, were put on board the capturing ship. After arrival at New York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted by the commissioner, under seal, to the district judge of Maryland district, to which district the Anne was removed, by virtue of the provisions of the act of congress of the 27th of Janaury, 1813, ch. 478.

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed in behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture; and, upon the whole evidence, the district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the district court was affirmed, *pro forma*, to bring the cause for a final adjudication before this court.

(437) Mr. Harper, for the appellant and claimant, argued, that the captors were incompetent witnesses, on the ground of interest, except when further proof was imparted to them;[1] and that they were not entitled to the benefit of further proof in this case, being *in delicto*.

The irregularity of their proceedings, and the violation of the neutral territory, would not only exclude them from further proof, but forfeit their rights of prize. The testimony being irregular, it must appear, affirmatively, that it was taken by consent, where the irregularity consists, not in a mere omission of form, but in the incompetency or irrelevancy of the evidence. The testimony of the captors being excluded from the case, the violation of the neutral territory would appear uncontradicted. The text writers affirm the immunity of the neutral territory from hostile operations in its ports, bays and harbors, and within the range of cannonshot along its

[1] The Adriana, 1 Rob. 34; The Haabet, 6 Rob. 54; L'Amitie, Id. 269, note a.

coasts.[3] Nor can it be used as a station from which to exercise hostilities.[4] As to the authority by which the claim was interposed, the Spanish consul's was sufficient for that purpose; especially under the peculiar circumstances of the times when, on account of the unsettled state of the government in Spain, no minister from that country was received by our government, (438) but the former consuls were continued in the exercise of their functions by its permission. In one of the cases in the English books, the Portugese consul was allowed to claim on account of violated territory, although it does not appear that he had any special instructions from his sovereign for that purpose.[5] But even supposing the powers of a consul not adequate to this function, whence arises the necessity that the neutral government should interfere in general? Because the enemy proprietor is absolutely incapable of interposing a claim on this or any other ground. But here the incapacity of the claimant is removed, his *persona standi in judicio* being restored by the intervention of peace. He may, consequently, assert his claim upon every ground which shows that the capture, though of enemy's property, was originally unlawful and void.

Mr. D. B. Ogden and Mr. Winder, *contra,* contended, that the captors were admissible witnesses in this case, as they are in all cases respecting the circumstances of the capture; such as collusive and joint captures, where the usual simplicity of the prize proceedings is necessarily departed from.

So, also, their testimony is generally admitted on further proof.[6] A claim founded merely upon the allegation of a violation of neutral territory is a case peculiarly requiring the (439) introduction of evidence from all quarters, the captors being as much necessary witnesses of the transaction as are the captured persons. Every capture of enemy's property, wheresoever made, is valid, *prima facie;* and it rests with the neutral government to interfere, where the capture is made within neutral jurisdiction. The enemy proprietor has no *persona standi in judicio* for this or any other purpose. But here the suggestion of a violation of the neutral territory is not made by proper authority. All the cases show that a claim for this purpose can only be interposed by authority of the government whose territorial rights

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[3] Vattel, L. 3, ch. 7, s. 132; Id. L. 1 Ch. 23, s. 289; Bynk. Q. J. Pub. L. 1 c. 8; Martens L. 8, s. ch. 6, s. 6; Azuni, part 2, ch. 5, Art. 1, s. 15.

[4] The Twee Gebroeders, 3 Rob. 162; The Anna, 5 Rob. 332.

[5] The Vrow Anna Catherina, 5 Rob. 15.

[6] The Maria, 1 Rob. 340; The Resolution, 6 Rob. 13; The Grotius, 9 Cranch, 368; The Sally, 1 Gallis. 401; The George, The Bothnea, and The Jannoff, 1 Wheaton, 408. Wheat. 3.

have been violated.[6] The public ministers of that government may make the claim, because they are presumed to be fully empowered for that purpose. But a consul is a mere commercial agent, and has none of the diplomatic attributes or privileges of an embassador; he must, therefore, be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government. A consul may, indeed, claim for the property of his fellow-subjects, but not for the alleged violation of the rights of his sovereign; because it is for the sovereign alone to judge when those rights are violated, and how far policy may induce him silently to acquiesce in those acts of the belligerent by which they are supposed to be infringed. There is only one case in the English books, where a claim of this sort appears to have been made **(440)** by a consul; and from the report of that case it may be fairly inferred that he was specially directed by his government to interpose the claim.[7] But even the Spanish government itself has not conducted with that impartiality between the belligerents which entitles it to set up this exemption.[8] Its territory was, during the late war, permitted to be made the theatre of British hostility, and in various instances was violated with impunity. Spain was incapable, or unwilling, at that time, to maintain her neutrality in any part of her immense dominions. In this very case the captured vessel was not attacked; she was the aggressor, and, in self-defence, the privateer had not only a right to resist, but to capture. The local circumstances alone would have prevented the Spanish government from protecting the inviolability of its territory, on a desert coast, and out of the reach of the guns of any fortress. Bynkershoek and Sir William Scott hold, that a flying enemy **(441)** may lawfully be pursued and taken in such places, if the battle has been commenced on the high seas.[1] A *fortioro,* may an enemy, who commences the first attack within neutral jurisdiction, be resisted and captured. But should all these grounds fail, the captors may stand upon the effect of the treaty of peace in quieting all titles of possession arising out of the war.[2] As between the American captors and the British claimant, the proprietary interest of the **(442)** latter was completely devested by the capture. The title of the captors acquired in war was confirmed by bringing the captured property *infra praesidia.* The neutral government has no right to interpose, in order to prevent the execution of

[6] The Twee Gebroeders, 3 Rob. 162, note; The Dilligentia, Dodson, 412; The Eliza Ann, Id. 244.

[7] The Vrow Anna Catharina, 5 Rob. 15.

[8] The Eliza Ann, Dodson, 244, 245.

[1] The Anna, 5 Rob. 345.

[2] Wheaton on Capt. 307, and the authorities there cited.

the treaty of peace in this respect, by compelling restitution to British subjects contrary to the treaty to which they are parties. The neutral government may, perhaps, require some atonement for the violation of its territory, but it has no right to require that this atonement shall include any sacrifice to the British claimant.

Mr. Harper, in reply, insisted, that the claim of neutral territory, as invalidating the capture, might be set up by a consul as well as any other public minister. He may be presumed to have been authorized to interpose it by his government; and in the case of The Vrow Anna Catharina[3] it does not appear that any proof was given to the court that the Portugese consul was specially instructed to make the suggestion. However partial and unjustifiable may have been the conduct of Spain in the late war, it has not yet been considered by the executive government and the legislature (who are exclusively charged with the care of our foreign relations) as forfeiting the right still to be considered, in courts of justice, as a neutral state. In the case of The Eliza Ann,[4] Sir W. Scott went on the ground of the (443) legal existence of a war between Great Britain and Sweden, although declared by Sweden only; and that the place where the capture was made was in the hostile possession of the British arms. The observations thrown out by him in delivering his judgment, as to the necessity of the neutral state maintaining a perfect impartiality between the belligerents, in order to support a claim of this sort in the prize court, were superfluous; because the facts showed that Sweden was in no respect to be considered as neutral, having openly declared war against Great Britain, and a counter declaration being unnecessary to constitute a state of hostilities. As to the alleged resistance of the captured vessel, it was a premature defence only, commenced in consequence of apprehensions from Carthagenian rovers, which frequented those seas; and being the result of misapprehension, could confer no right to capture, where none previously existed. Being in a neutral place, the vessel was entitled to the privileges of a neutral. Resistance to search does not always forfeit the privileges of neutrality; it may be excused under circumstances of misapprehension, accident, or mistake.[5] But resistance to search by a neutral on the high seas is generally unjustifiable. Here the right to search could not exist, and, consequently, an attempt to exercise it might lawfully be raised. Finding the neutral territory no protection, the captured vessel resumed her rights as an enemy, and attempted to defend herself. The titles of possession,

[3] 5 Rob. 15.
[4] Dodson, 244.
[5] The St. Juan Baptista, &c., 5 Rob. 36.

which are said (444) to be confirmed by a treaty of peace, are those which arise from sentences of condemnation, valid or invalid; but the principle cannot be applied to a mere tortious possession, unconfirmed by any sentence of condemnation like the present. The capture being invalid *ab initio,* and the former proprietor being rehabilitated in his rights by the intervention of peace, may interpose his claim at any time before a final sentence of condemnation.

STORY, J., delivered the opinion of the court: The first question which he presented to the court is, whether the capture was made within the territorial limits of Spanish St. Domingo. The testimony of the carpenter and cook of the captured vessel distinctly asserts that the ship, at the time of the capture, was laying at anchor about a mile from the shore of the island. The testimony of the captors as distinctly asserts that the ship then lay at a distance of from four or five miles from the shore. It is contended, by the counsel for the claimants, that captors are in no cases admissible witnesses in prize causes, being rendered incompetent by reason of their interest. It is certainly true, that, upon the original hearing, no other evidence is admissible than that of the ship's papers, and the preparatory examinations of the captured crew. But, upon an order for farther proof, where the benefit of it is allowed to the captors, their attestations are clearly admissible evidence. This is the ordinary course of prize courts, especially where it becomes material to ascertain the circumstances of the capture; for in such cases the (445) facts lie as much within the knowledge of the captors as the captured; and the objection of interest generally applies as strongly to the one party as to the other. It is a mistake to suppose that the common law doctrine, as to competency, is applicable to prize proceedings. In courts of prize, no person is incompetent merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. The cases cited at the argument distinctly support this position; and they are perfectly consistent with the principle by which courts of prize profess to regulate their proceedings. We are therefore of opinion that the attestations of the captors are legal evidence in the case, and it remains to examine their credit. And without entering into a minute examination, in this conflict of testimony, we are of opinion that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights

of his sovereign. We are of opinion that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or a diplomatic agent of his sovereign (446) intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion, or proof, of any such delegation of special authority in this case; and therefore we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed. It is admitted that a claim by a public minister, or in his absence, by a *charge d' affaires,* in behalf of his sovereign would be good. But in making this admission, it is not to be understood that it can be made in a court of justice without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment.[1]

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of the country; and the argument is, that a capture made in a neutral territory is void; and (447) therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him, and him only, it is to be considered void. The enemy has no right whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli,* to the captors. This is a clear result of the authorities; and the doctrine rests on well-established principles of public law.[2]

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[1] See Viveash v. Becker, 3 Maule and Selwyn, 284, as to the extent of the powers and privileges of consuls.

[2] The same rule is adhered to in the prize practice of France, and was acted on in the case of The Sancta Trinita, a Russian vessel, captured within a

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the (448) coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. And the only remaining inquiry is, whether the captors have so conducted themselves as to have forfeited the rights given by their commission, so that the condemnation ought to be to the United States. There can be no doubt that if captors are guilty of gross misconduct, or laches, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially when the government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud, may readily be imagined in which it would become the duty of this court to enforce this principle in its utmost rigor. But it has never been supposed that irregularities, which have arisen from mere mistake, or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record from which we can infer that there was any fraudulent (449) suppression, or any gross misconduct inconsistent with good faith; and, therefore, we are of opinion that condemnation ought to be to the captors.

It is the unanimous opinion of the court that the decree of the circuit court be affirmed with costs.

Decree affirmed.

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mile and a half of the coast of Spain; but the counsel of prizes refused restitution, because the Spanish government did not interpose a claim on account of its violated territory. Bonnemant's Translation of DeHarbeu, tom. i, p. 117.

ANTELOPE, THE, (1825, U. S.)
10 Wheat. 66.
Marshall, Supreme Court.

(Extract) The consuls of Spain and Portugal respectively, demand these African slaves, who have, in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States.

ARNOLD v. THE UNITED INSURANCE COMPANY, (1800, U. S.)
1 Johns. Cases 363; 1 N. Y. Common Law Reports 354.
Kent and Lansing, Supreme Court of New York.

KENT. (Extract) As long as public ministers and consuls confine themselves to the business appertaining to their public characters, their domicile is not changed, but remains in the country from which they are deputed, and they are not subjects of the country in which they reside. (Vattel, 231; Martens, 155, 229.) But if they engage in business inconsistent with or foreign to their public or diplomatic (368) character, they are thenceforth to be considered as domiciliating themselves abroad, and becoming as subjects, amenable to the ordinary jurisdiction of the state. (Vattel, 711-714.) As they contribute by their industry and property, when engaged in trade, to aid the government under which they reside, it is but reasonable that the enemies of that government should have a right to hold their property responsible as that of an enemy.

I am of opinion, therefore, that Mr. Hawley, by becoming a merchant at the Havanna, a character wholly distinct from his consular functions, was rightfully considered as establishing his domicil there; and that he became, in regard to his transactions as a merchant, and in reference to the enemies of Spain, a Spanish subject.

LANSING. (Extract) But it has been urged, that as Hawley was a consul of the United States, he is, as such, in some measure entitled to the protection of the law of nations.

The admission of consuls depends either upon express convention or the permission of the sovereign in whose dominions they reside. (Vattel, 132.) But by receiving them, the sovereign strictly engages to allow them all the liberty and safety necessary in the proper discharge of their functions. What personal immunities a consul is particularly entitled to it is not necessary, on the present occasion, to consider; for whatever they may be, they can only be such as to preserve his safety and independence in the discharge of those func-

tions. An exemption from imposts is not essential to his quality of consul; if he engages in mercantile speculations, he is of course subject to all the burdens which other inhabitants, not subjects of the country in which he resides, are liable to. If there is any difference between his situation and that of other strangers, it may, perhaps, arise from his being, as an acknowledged public functionary of a foreign nation, exempted from personal service in any hostile enterprise. This however, (372) will not so effectually disengage him from the interests of the society in which he resides as to make him completely a neutral. His property must contribute to the support of the war.

ASPINWALL v. THE QUEEN'S PROCTOR, (1839, Great Britain—U. S.)

2 Curt. Eccl. 241.

Sir Herbert Jenner, Prerogative Court of Canterbury.

SIR HERBERT JENNER. The question arises with respect to the right of the American consul in this country to take administration of the goods of an American subject, clearly domiciled in America, who died *in itinere,* leaving personal property here, and money in the hands of a merchant in this town.

It appears, that on the death of Mr. Hammond, (245) Colonel Aspinwall, the American consul in this country, took possession of the property about him, paid his funeral and other necessary expenses, but upon application to Messrs. Baring and Co. they declined to pay over the money in their hands until letters of administration were taken out, and they could obtain a valid discharge. An application was accordingly made to the court to grant administration to Colonel Aspinwall, founded on an act of congress, authorizing American consuls to take possession of the effects of citizens of the United States dying in foreign countries; but the court was of the opinion that it could not grant such an application on an *ex parte* motion, and some discussion took place as to the form of the decree which should go out. Eventually, a decree went out against all persons, and an intimation was given, that if no person appeared to shew cause against it, the court would grant administration to Colonel Aspinwall. The decree was served in the usual manner, and an appearance was given on behalf of the crown, praying that the court would reject the claim of Colonel Aspinwall. It is said that the crown has no *persona standi,* for that the deceased, being a domiciled foreign subject, dying *in itinere,* the right to his property, locally situated in this country, is governed by the law of the country to which he belonged. It is true,

that by the law and practice of this court, the distribution in such cases is to be according to the law of the country in which the party was domiciled at his death; but the property being in this country the court will grant administration to some person who is entitled to the custody of the property, and has au-(246)thority to pay the debts due from the deceased; and the court, in deciding the question, whether Colonel Aspinwall is or is not entitled to the administration, must be guided by the law and practice of this court. Now I cannot say that the crown has no right to interfere with property belonging to foreigners, in order to protect that property; that in all cases where foreigners die intestate in this country, the crown has no right to appear and shew cause why a person claiming the administration ought not to have it. The crown has a right to the custody of the property till a superior title to it can be shewn. This law is not peculiar to our country; it is the general law, and it cannot be the general law of the United States that British consuls are entitled to administer the estates of British subjects dying in the United States, or why was the special law of New York passed, which is mentioned in the affidavit? What is the law upon which Colonel Aspinwall rests his claim? An act of congress passed in 1792, for the guidance of consuls in foreign countries, giving them certain powers and authorities so far as is consistent with the law of the country to which they are accredited; that is, the power of the consuls is to be governed by the law of the country to which they are accredited, and not by the law of the country from which they are sent. There may be grave reasons why the law of the United States should be different from the law of this country, but if there is a difference, then no authority at all is given to the consuls. The question, therefore, is not whether the law of America authorizes the consul to take possession of the property of its sub-(247)jects dying in this country, but whether the law of this country permits it, and it is upon the ground that it does so, that Colonel Aspinwall applies for letters of administration.

I am not aware of any case in which it has been held that, by the law of this country, it is competent to a foreign consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country. In the case of Sidy Hamet, the emperor of Morocco claimed not the custody of the property but the interest itself; the *jus in re* was in him, and if it could be shewn that the property in this case has devolved to the American government, the court would be inclined to grant letters of administration to the consul. But it is only to hold it in trust, and if no claim is made to the property, then the treasury of the United States would be entitled

to take it, and it is not shewn that Mr. Hammond died without relations.

Is it, then, the law and practice of this court, that such an administration should be granted? I apprehend not, and that the crown is the party to see that the property of any person dying in its dominions gets into proper hands.

It has been said, that by the law of the United States, British consuls may take possession of the property of British subjects in similar circumstances. But this is not by the law of nations, but by custom or express enactment, and it is not a law which this country is bound to follow: this country has not adopted the principle of reciprocity in this respect.

I am of opinion that there is not sufficient evidence to shew that the administration ought to be (248) granted, as prayed, to Colonel Aspinwall, and I reject his petition. No claim is made by the crown.

ATLANTIC, THE, (1849, U. S.)
Abb. Adm. 451; Fed. Cases 620.
Betts, Circuit Court.

(462) BETTS, J: (Extract) The libellant shipped at New London in July, 1845, as carpenter's mate, on a whaling voyage.

In consequence of injuries received by him, in the discharge of his duty, he was taken on shore in the port of Lahaina, in the island of Maui, one of the Sandwich Islands, and left in (463) the hospital there. The ship proceeded on her voyage, and after completing her cruise, touched at Maui, on her return home, and received the libellant on board, he being placed there as a sick and disabled seaman by the consul, and was brought to the United States, the master receiving $10 passage money from the consul therefor.

The libellant now demands wages for the whole voyage, together with the expenses of his cure.

There are disagreements in several particulars between the statements of the libel and those of the answer, but they do not essentially affect the points upon which the cause turns, and accordingly no time will be spent in the consideration of them.

The questions in the case are three:

Was the libellant discharged from the ship at Maui, so as to terminate the shipping contract, and exempt the vessel from all further liability in consequence of his shipment?

Was the condition contained in the shipping articles, limiting the libellant's compensation or wages to the time he was actually on

board and capable of rendering the services he contracted to perform, a legal condition and obligatory upon him?

Is the ship chargeable with the expenses of the libellant's cure? and if so, to what extent?

1. It is incumbent on the claimants to set forth in their answer, a state of facts justifying the discharge of the libellant in a foreign port, and to support the allegations by competent and sufficient proofs.

They plead that the libellant, on March 16, 1846, fell from the topsail yard of the ship through want of sufficient care on his part, and was so severely injured by the fall, and became so sick in consequence of it, that he was rendered unable to perform his duty on board, and was, at his own request, and by order of the captain, and by aid of the consular agent, placed in the hospital. That on March 18th, he was dis-(464)charged from the ship by his own consent, and by the consent and authority of Giles Waldo, the United States consul at that port, the master of the ship having produced to the consul the list of the ship's company, certified according to law, and having paid to the consul the sum of $36, being three months' wages to the libellant.

The evidence to support this discharge is a certificate,—represented to be under the consular seal, but the impression of the seal is too faint to admit of its being deciphered,—attached to the articles, and expressed in these terms:

UNITED STATES CONSULAR AGENCY,
Lahaina, Hawaian Islands.

"I, the undersigned U. S. consular agent, do hereby certify, that George Stotesburg has been discharged from ship Atlantic on account of sickness and in accordance with the laws of the United States.

"Given under my hand and seal this 18th day of March, 1846.

GILES WALDO,
U. S. Consular Agent.

"By A. H. Linigsyez," (or some other similar name, not easily determined from the signature.)

On another paper a memorandum or account is made in this form:

Ship Atlantic and owners to U. S. Consulate.

3 months' wages to Stotesburg, ...	$36 00
Certificate, ...	2 00
	$38 00

Rec'd payment,
(Signed as above.)

Lahaina, March 18, 1846."

These papers are all the evidence produced to support the allegation of the answer, that three months' wages had been (465) paid to the commercial agent, and that the discharge had been given under the authorization of the act of congress of February 28, 1803. 5 U. S. Stats. 396.

The discharge, however, manifestly was not made in conformity with the provisions of the statute; for the cardinal requisite to the exercise of that authority is, that application for the discharge shall be made by both the master and mariner; and it is not even certified that the consular agent acted on any such application; on the contrary the proofs import that the libellant was sent ashore by direction of the master, and under expectation that he still remained connected with the vessel as if he had continued in her. The court cannot assume that the assent of the libellant to his discharge was given, merely upon the fact of his being left in a hospital in his then maimed and dangerous condition; nor upon the assertion of the person acting for the consular agent that the libellant was discharged from the ship in accordance with the laws of the United States. It is unnecessary to inquire, whether an averment in such certificate that consent was given by the seaman and master in the presence of the consul, or was proved to him, would justify the discharge without other evidence of the fact, because the certificate contains no such allegation. Indubitably the particular which gives authority to consuls to act in this behalf under the statute, must be duly established, or his proceedings will be a nullity. This is a special power and trust confided to consuls and commercial agents, and must be exercised by those officers strictly in pursuance of the directions of the statute.

Nor can the payment of $36 wages made to the consul by the master, be accepted as a payment of the three months' wages prescribed by the act. The hiring was for a share of the takings on an entire whaling voyage; and the rate of the lays could not, by the method of apportionment appointed in the articles, be applied with any justness to the period of service which had then elapsed. The vessel was on her outward (466) cruise to the fishing grounds, and it would be evidently unjust to measure the compensation of the libellant by lay shares out of the chance takings on that part of the cruise. The takings of the entire voyage was the basis upon which the libellant's share should be computed. Twelve dollars per month was evidently adopted as an arbitrary allowance of wages. It might chance to be more advantageous to the libellant than his lay of the earnings of the adventure, apportioning the time he was in the ship with the entire duration of the voyage. Still, it might be disproportionately short of his share. And it certainly was not competent to the

master and consular agent to determine that matter without the clear undersanding and concurrence of the libellant. I think, therefore, that there is not in this discharge that conformity with the requirements of the act of 1803, which will uphold it to protect the ship. Jay v. Almy, 1 Woodb. & M. 271.[1]

The act of July 20, 1840, (5 U. S. Stats. 394, C. 48, §§ 5, 6, 9,) empowers consuls and consular agents abroad, to discharge seamen from their contracts or their ships, and to exact the payment of three months' wages, or even more, or to dispense with it as in their judgment they may think expedient. This power can be exercised but in two cases,—upon the application of both the master and the mariner, or upon that of the mariner alone. The master can act in the matter only jointly with the mariner. And it is not enough for the consul to certify that he gave the discharge "lawfully," or that he gave it "in accordance with the laws of the United States." It must be made to appear upon what grounds he proceeded. The court cannot intend that it was on the joint request of the master and seaman; nor that it was on the sole application of the latter, nor even that one or other ingredient of fact actually existed. The power imparted to consuls is limited and specific in character, not appertaining to him *virtute officii*, (467) but conferred by a statutory provision; and the law raises no presumption or intendment in support of his doings, until it is shown that his jurisdiction attached to the subject,—that a case had occurred falling within the scope of his powers. The rule is coeval with the existence of statutory or limited tribunals or officers, that their doings must be made to appear to be within their authority, and that nothing can be supplied in support of their jurisdiction by intendment. 1 Co. Inst. 117; 2 Co. R. 16; 1 Lilly, Abr. 371; 1 Levinz, 104; Powers v. The People, 4 Johns. 292; Atkins v. Brewer, 3 Cow. 206; Grignon v. Astor, 2 How. 319; Bennett v. Bush, 1 Den. 141. Nor is it sufficient for the officer to aver ever so positively his jurisdiction. He must set forth the facts necessary to confer it, and those jurisdictional facts must be established by proof. The People v. Koebar, 7 Hill, 39, and cases cited.

I do not discuss the question raised respecting the sufficiency of the proof, that Giles Waldo was the consular agent of the United States at Lahaina, or that the gentleman who has subscribed the act for him, was his legally authorized substitute. Admitting that the seal of the consulate imports a legal authority in the person using it to do all official acts appertaining to the office, still the case calls for the remark, that the papers should present a distinct impression of a seal so that it may be identified and discriminated. The paper before

[1] Compare Hutchinson v. Coombs, Ware, 65; also Minor v. Harbeck, *post*.

the court does indeed bear a faint similitude of a seal, but neither vignette nor motto is distinguishable; and the vague flourish employed for a signature, affords no means by which the authentication of the discharge can be verified.[1]

AUBREY, IN RE, (1885, U. S.)
26 Fed. Rep. 848.
Pardee, Circuit Court.

On application for a writ of *habeas corpus.*

PARDEE, J: The relators are held by the keeper of the parish prison under a commitment from one of the commissioners of this court, purporting to be in compliance with section 728, Rev. St., and based (849) on a petition of her Britanic majesty's consul, alleging that by virtue of the authority conferred upon him by law as such consul, to sit as judge in a controversy between a seaman of the crew of a British ship and the captain and others of the crew thereof, he has made a decree that one John W. Dakin, Frank Aubrey, and Alfred G. Bardo, all of the British ship Lancefield, be sent to the United Kingdom for trial for an offense committed in the said United Kingdom, and which cannot be tried by any court of the United States or of the state of Louisiana; and concluding with a prayer that the aforesaid Dakin, Aubrey, and Bardo may be imprisoned in the prison of this parish, and held there until the aforesaid decree can be put in force, as is provided by section 728 of the Revised Statutes.

It is made to appear on the argument that the alleged offense was assault and battery committed on board a British ship in the port of Cardiff. It is probable that the commitment, and the petition on which it is based, are technically defective, the petition particularly, in not being more specific, but as new process could be at once issued, and the parties rearrested, and as the argument has been over the merits of the case as though the commitment and petition were complete, we will consider the case on its entire merits.

The relator's counsel contend that whether the offense alleged against relators was committed in or out of the United Kingdom, on the high seas or in port, the decree rendered by the consul was not made or rendered by him by virtue of an authority conferred on him by British law as such consul, to sit as judge or arbitrator in such differences as arise between captains and crews of British vessels, and they rely upon the British shipping acts.

[1] That a regular and valid consular discharge, properly certified, is conclusive on all points duly passed upon by the consul, unless his conduct be proved corrupt or fraudulent, see Lamb v. Briard, *ante,* 367; Tingle v. Tucker, decided April, 1849, reported *post,* in its order.

In passing upon the question, it is immaterial to consider whether the naval court provided for by the British shipping act was the proper tribunal to try the relators for their alleged offense; whether extradition could have been resorted to, or whether the alleged consular action was proper and discreet, under the real facts in the case. The offenses within consular jurisdiction, under the British merchant shipping acts, are offenses committed out of the United Kingdom. But it appears that the said acts only include or embrace the statute law relating to British merchant ships and seamen, and that the common law of Great Britain, except when altered by statute, remains still in force for the government of consuls. See paragraph 1, Book of Instructions, *infra*. The consular jurisdiction in relation to the offenders against British law on board British ships, under both statute law and common law, has been proved in this case by the evidence of the consul, himself an English barrister at law, to be as found in a book entitled "Instructions to Consuls Relating to Matters Affecting the British Mercantile Marine," prepared by the board of trade, and approved by H. M., secretary of state for foreign affairs of date 1883. Paragraph 189 of said instructions reads as follows:

(850) "Upon a complaint being made to the consul of any offense against British law having been committed on the high seas, or if, without complaint, he becomes aware of any serious offense having been committed on board of a British ship, he may inquire into the case upon oath, and may summon witnesses before him for that purpose, and if there is evidence which, in the opinion of the consul, is sufficient to substantiate the charge, he may send the offender to some place in the British dominion at which he can be tried," etc.

The high authority issuing and indorsing the said book of instructions should remove any doubt as to whether it is in accordance with British law. See Dainese v. Hale, 91 U. S. 13; and, under the paragraph cited, the jurisdiction of the consul in the case in hand seems to be clear. At all events, when the British consul in a matter of discipline, is dealing with British subjects on board of a British ship, we are not called upon to look for his jurisdiction further than the instructions issued by the British foreign office.

Conceding, therefore, the jurisdiction of the consul under British law, it remains to determine whether section 728, Rev. St., warrants the commitment issued by the commissioner in the present case. The statute was originally passed to enable our government to carry out its treaty stipulations with Prussia and other countries. See 9 St. at Large, 78. In the revision of the statutes the preamble is omitted, and the application of the statute seems to be enlarged so as

to embrace the consular agents of all nations; and it does embrace all consular agents whose governments give them jurisdiction, unless the statute is so construed as to hold that the authority conferred upon such consular agents to sit as judge or arbitrator, etc., mentioned in the statute, refers to and is limited to authority conferred by the consent of the United States. Such a construction is strengthened by the original preamble to the statute, and by the fact that sections 4079, 4080, 4081, Rev. St., (which precisely provide, under limitations and restrictions looking to the protection of citizens of the United States, for enforcing the judgments, orders, and decrees of consular officers,) are limited, in terms, to such officers of foreign nations as are entitled thereto, under treaty stipulation with the United States, and then only when such foreign country gives the same privilege, to consular officers of the United States, the latter fact to be ascertained and proclaimed by the president. Unless such claimed construction shall be given as to the authority necessary under section 728, it would render sections 4079, 4080, and 4081 practically nugatory, because section 728 in itself is so broad that all action in enforcing decrees of consular officers could be had thereunder, and the restrictions and limitations provided for in other sections of the statute avoided, and besides, foreign nations with whom we have no treaty stipulations would stand on as good, if not on a better, footing than those nations to which the United States is bound by treaties of reciprocity and commerce. The rule that the several sections of the statutes should be construed together, and harmonized, if possi-
(851) ble, also leads to the suggested construction of section 728, and we are inclined to adopt it in this case.

The facts of this case, however, as they are admitted, suggest a doubt whether either or any of the sections of the statute referred to authorize the action of the commissioner, and justify the commitment issued by him. The case, as submitted, does not show any difference between the captain and the crew of any vessel, although it is alleged as the source of the consul's jurisdiction; but rather, it shows that the relators are charged with an offense against the laws of Great Britain committed in the United Kingdom; and this goes still further to show that the construction claimed for section 728 is too broad, because under such construction, in some cases, it may be made a substitute for our extradition laws, and permit the extradition of alleged fugitives from justice without the performance of such conditions as congress has seen fit generally to guard that important matter. See section 5270, Rev. St. *et seq.*

As a matter of law, foreign consuls have no jurisdiction within the territory of the United States except by force of treaty stipulations.

See Wheat. Int. Law, 217. The judicial power of a consul depends upon the treaties between the nations concerned and the laws of the nation the consul represents. Dainese v. Hale, 91 U. S. 13. See The Elwine Kreplin, 9 Blatchf. 438. Consular jurisdiction depends on the general law of nations, subsisting treaties between the two governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. 2 Op. Atty. Gen. 378.

We conclude, therefore, that neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given, either by express statute or treaty stipulation.

So far as the claim is made that the relators should be held in a spirit of comity and reciprocity, we can only say that the comity and reciprocity to be extended to representatives of foreign governments depends upon congress, and is not lodged within the judiciary. See 2 Op. Atty. Gen. 378, citing The Nereide, 9 Cranch, 389.

The writ of *habeas corpus* should be made absolute, and the relators discharged, and it is so ordered.

After the reading of the decision, Mr. Florence, representing the British consul, asked the court to detain the prisoners for a brief period until he could consult the consul as to whether an appeal would be taken. The request was granted, but no one appearing within a reasonable time, the men were set at liberty.

BOARMAN, J., concurs.

AYCINENA, IN THE MATTER OF, (1848, U. S.)
1 Sand. 690.
By the Court, New York City Superior Court.

BY THE COURT: The objection to the form of the statement presented to us, is untenable. The form is of no consequence. The fact is alleged, and is undisputed, that the party is the consul general of the republic of Guatemala; and that is sufficient to call upon the judge, to determine whether he will or will not further entertain the proceeding.

The question is, whether under the judiciary act of congress, this attachment can be sustained. By that act, the jurisdiction of all suits against consuls, is vested exclusively in the district court. Is this a suit, within the meaning of the judiciary act?

Having reference to the provision in the constitution of the

United States, and its objects, together with the good sense of the thing, we are constrained to say that this is a suit, within the act of congress. One object was to prevent the harassing of foreign ministers and consuls in the state courts. The foundation of this proceeding by attachment is a debt, and it seeks the recovery of the debt from this consul, through the coercion of a state tribunal. It is therefore a suit, in the sense in which that word is used in the judiciary act, and the attachment must be discharged.

We are asked to award costs to the consul, but we find no authority for giving costs. Indeed, there is no ground for it, as it is not shown that the attaching creditor knew of the privilege now interposed.

Attachment discharged.

AZOGUE v. UNITED STATES, (1891, U. S.)
26 Ct. Cl. 430.
Davis, Court of Claims.

(432) DAVIS, J., delivered the opinion of the court:

Plaintiff, a resident of Philadelphia, was employed by William Reed Lewis, then recently appointed consul at Tangier, "as an interpreter and general body servant at the United States consulate at Tangier, at a salary of $30 (United States money) per month, beginning February 19, 1887. It is agreed that after the expiration of ten months from February 19, 1887, the salary is to be decreased to $20 per month.

It was further understood and agreed that Azogue should "pay his own board and traveling expenses."

In 1888 or 1889 (the testimony is conflicting as to the date) a difference arose between the consul and plaintiff, which resulted in severing their relations.

This action is now brought against the United States for payment of plaintiff's wages from April 1, 1888, to August 31, 1889, when, according to his theory of the case, the separation took place. We must first discover whether the United States were a party to any contract with plaintiff. The agreement signed by the consul and plaintiff negatives such an inference, as it shows that "William Reed Lewis, a citizen of the state of Pennsylvania, U. S. A.," not William Reed Lewis as consul, agreed to employ and pay the plaintiff, described as "Ramon Azogue, a citizen of the United States," who upon his part agreed "to perform all duties assigned to him to the best of his ability;" that is, duties assigned to him "by the party of the first

part," who was the aforesaid "citizen of the State of Pennsylvania, U. S. A." Further, the contract was to be "terminated at any time by either party on thirty days' notice." The contract, on its face, was between private individuals, and it provided for two kinds of service, one of which is not compensated by the government, to wit, that of a "general body servant;" and it was terminable upon notice, which the government never stipulates to give to a subordinate civil employe, and which it does not require from him; nor was a government officer to terminate it, but to Lewis, personally, was reserved that power; it was not given to the consul, who might be another individual, or to the vice consul in the consul's absence, much less was it reserved to a superior officer. There is nothing in the agreement showing an intention or desire to bind the United States; there is in it every mark of a purely private and personal transaction. (433)

The employment of Azogue as interpreter in the consulate at Tangier was not reported to the department of state by the consul otherwise than by including his name in his quarterly accounts and in the list of employes of the consulate. The department of state neither authorized nor forbade, neither approved nor disapproved, the selection; it simply assigned to the consul a certain sum of money with which he could pay an interpreter—any interpreter he chose to employ.

Section 26 of the Consular Regulations of 1888 provides for salaried interpreters at certain posts (see Rev. Stat., 1678 to 1680, 1692, 1693, 1740), the expenditure required to be made under the direction of the secretary of state, and Tangiers is not one of those posts. This section recognizes as a fact that some of the interpreters are appointed directly by the president and that those at the more important posts receive a commission. The plaintiff received no appointment from any officer of the government in Washington, and his only commission was the personal agreement we have already cited, an agreement which it is safe to assume would not have received the approval of the department of state had it been brought to the attention of that department. The same section of the regulations recognizes that the duty of nominating an interpreter is intrusted to the head of the consulate, and Azogue was never nominated as interpreter to the department of state.

Section 42 of the regulation and sections 1756 and 1757 (23 Stat. L., 22) of the Revised Statutes require the interpreter to take the oath of office. It does not appear that plaintiff took that oath. (See also §§ 43, 532, regulations; see, to the same effect, regulations, 1881, §§ 5, 22, 37, 38, 39, 66, 67, 114, 425.)

The regulations of 1881 were in force when the contract in suit

was made. They contained substantially the same provisions as the regulations of 1888.

The only statutory recognition of an interpreter at Tangiers is contained in appropriation acts. Thus, in the diplomatic and consular appropriation act, approved July, 1886, under the head of "contingent expenses, foreign missions" (although the post at Tangiers is not a mission, but a consulate) appears this clause:

"For the purpose of enabling the president to provide, at the public expense,...for rent, postage, telegrams, furniture, messenger service, clerk hire, compensation of cavasses, (434) guards, dragomans, and porters, including compensation of interpreter, guards and Arabic clerk at the consulate at Tangiers," etc. (24 Stat. L., 108; also 24 Stat. L., 480; 25 Stat. L., 248; Stat. L., 698.)

The same provision occurs in subsequent statutes, the only difference being that in two of the acts the word "janitors" appears before the words "and porters." The department of state thereupon allowed the consulate at Tangiers the sum of $800 per annum (during the period covered by this action) "for interpreter, guards, and Arabic clerk," out of which the interpreter was paid at the rate of $280 a year.

Therefore, in the appropriation acts and by the department of state, the interpreter was classed among the subordinate employes of the consulate whose tenure depended upon the will of the consul. He fell into the same category as the clerks, guards, cavasses, janitors, and porters, who are employed and discharged by the consul as he may find them needful to the consulate or satisfactory to him in service.

The supervision exercised by the department of state over this class of employes is limited to the allotment of the proportionate share of the total appropriation for contingent expenses, to care that the allotment is properly expended, and it holds the consul responsible for the conduct of his consulate—that is, for the acts of his subordinates. The secretary of state would not and could not, in practice, indicate the individuals to be employed as clerks, janitors, cavasses, or porters in all the consulates entitled to such service.

The small sum allowed the consulate at Tangiers would not be alone sufficient to support an interpreter, and it must be assumed that the department contemplated either that he should be allowed to engage in business under the exception provided for in section 425 of the regulations of 1881, and the department gave no such authority, or, what is more likely, that the consul should not employ continuously an interpreter, but only from time to time, as the services might become necessary, when payment was to be made for the time when the interpreter was actually employed.

The consular regulations (§§ 28, 29, and 484, of 1888; see also regulations 1881, §§ 24, 25, and 70) leave the appointment of office clerks to the consul's discretion, with a reservation to the department in special cases; the other classes of subordinates (435) are not mentioned in the regulations, and their employment, therefore, rests with the head of the consulate in the absence of action by the department.

We conclude that the agreement between Azogue and Lewis was a contract between individuals, to which the United States were not a party.

There is, however, another difficulty in plaintiff's way. His contract was for double service, for which he was to be paid at first $30 a month, later $20 a month, he to pay his own board and traveling expenses; the services to be rendered for this emolument were first those of a body servant (without board or traveling expenses), for which the United States never pay, and second those of interpreter. The court is quite unable to determine (even if plaintiff's contention as to the law be correct) what proportion of the monthly allowance of $30 or $20 should be given for the one service and what for the other; and as he contracted for the two inconsistent services, he can not recover the total ($280) allowed by the department to the consul for an interpreter, without showing, which he has not done here, that his agreement with that officer contemplated that this sum was to be paid for his services as an interpreter alone.

Petition dismissed.

BAIZ, IN RE, (1890, U. S.—Honduras)
135 U. S. 403; 10 Sup. Ct. Rep. 854.
Fuller, Supreme Court.

On petition for a writ of prohibition or mandamus.

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the district court of the United States for the southern district of New York against Jacob Baiz, (see 41 Fed. Rep. 732,) to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year. The defendant entered a general appearance in the action, which was filed July 17, 1889. On the 25th day of September, 1889, the defendant verified his answer, which contained a plea to the jurisdiction of the district court in the following language: "The defendant alleges that he is now, and ever since the month of July, 1887, has been, the consul general of the republic of Guatemala at the city of New York, and that in or about the month of May, 1889, he received from the republic of Guatemala a

duly-authenticated copy of a decree in the English language, dated at the national palace in Guatemala, May 14, 1889, with instructions in writing from said government to publish the same in the newspapers of the United States, and which said decree had previously been published in the official Gazette, or newspaper, published in said republic, and that pursuant to such instructions, which were sent to him both by letter and by cable, and not otherwise, he did, on or about the 9th day of June, 1889, send to the managers of the Associated Press, in the city of New York, said authenticated copy of said decree, stating that it was possible that said managers would find it of sufficient interest to publish. That prior to the 16th day of January, 1889, one Senor Don Francisco Lainfiesta was envoy extraordinary and minister plenipotentiary of the republic of Guatemala in the United States, and on or about that day he departed from the United States upon a temporary leave of absence, duly granted to him, and that from on or about that day, down to on or about the 10th day of July, 1889, this defendant became and was the acting minister and sole representative of the said republic of Guatemala in the place, and during the absence, of the said envoy extraordinary and minister plenipotentiary, and was exclusively in charge of the diplomatic affairs of the said republic in the United States. And by reason of the facts herein alleged this defendant claims that this court has no jurisdiction of this action, and that, if any jurisdiction for said act in fact exists in any court, it is vested solely in the supreme court of the United States, pursuant to the provisions of the constitution and the statutes of the United States in such case made and provided." In January, 1890, a motion was made "for an order setting aside the service of the summons and all subsequent proceedings in the action, and that the court dismiss the same, on the ground that it has no jurisdiction of this action, and had no jurisdiction over the defendant at the time of the commencement thereof." This motion was based on the defendant's affidavit, and upon proofs consisting of original written communications from the state department to Baiz, and of duly-certified copies of papers on file in said department; and was resisted by the plaintiff on certain affidavits, and an original letter from the department. On the 17th day of February the motion was denied, and an application was then made to this court for a rule to show cause why a writ of prohibition should not issue to the judge of the district court, prohibiting him from proceeding further in said action; or, if a writ of prohibition could not issue, then for a rule to show cause why a writ of *mandamus* should not issue, commanding the judge to enter an order dismissing the cause, for the reason that the jurisdiction of said action existed solely in the su-

preme court, under the constitution and laws of the United States; or for such other and further relief as might be proper in the premises. The application was made upon the petition of the defendant in the action in the district court, and annexed to the petition and forming a part of it was a certified copy of the entire record in the district court, including every paper used upon the motion, and the opinion of the court. A rule having been issued, the judge of the district court returned thereto that the motion was denied upon the facts and considerations appearing in the record and opinion, copies of which were attached to the petition, and to the order to show cause, and submitted to this court whether the district court should take further cognizance of the said cause, or should dismiss the same.

It appeared before the district judge, as it does here, that Mr. Baiz was and is a citizen of the United States, and a resident of the city of New York, and that he has been since 1887 consul general of Guatemala; that Senor Lainfiesta was, on the 16th day of January, 1889, the minister of Guatemala, of Salvador, and of Honduras, in the United States, and that on that day Senor Lainfiesta addressed a note to the secretary of state, advising him that he was compelled to go to Guatemala for a short time, and saying: "Meanwhile I beg your excellency to please allow that the consul general of Guatemala and Honduras in New York, Mr. Jacob Baiz, should communicate to the office of the secretary of state any matter whatever relating to the peace of Central America that should without delay be presented to the knowledge of your excellency." The secretary of state, accordingly, on the 24th day of January, informed Senor Baiz, "consul general of Guatemala and Honduras," that the note of Minister Lainfiesta had been received, and that he would "have pleasure in receiving any communication, in relation to Central America, of which you may be made the channel, as intimated by Senor Lainfiesta." On the 6th of March, 1889, Mr. Blaine having been appointed secretary of state, information of that fact was communicated by him to "Senor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador, and Hunduras," the receipt of which was acknowledged by the latter under date of March 7th, the note of reply being signed, "Jacob Baiz, Consul General." April 1st, the secretary of state addressed a communication to "Senor Don Jacob Baiz, in charge of the business of the legations of Guatemala, Salvador, and Honduras," informing him of the appointment of Mr. Mizner as envoy extraordinary and minister plenipotentiary of the United States to the republics of Guatemala, Salvador, and Honduras, and asking him to "kindly apprise the governments of Guatemala, Salvador, and Honduras" of the appointment. In the official circular issued by the department of

state, "corrected to June 13, 1889," concerning the "foreign legations in the United States," under the heads of Guatemala, Salvador, and Honduras, mention is made of the absence of Mr. Lainfiesta, and a foot-note is referred to which reads "Jacob Baiz, consul general, in charge of business of legation, New York city." That circular shows that Russia, Austria, and Corea were represented by ministers who were absent, and had *chargés d' affaires ad interim,* whose names are severally given, described as such, and the dates of their presentation. Brazil and Venezuela had no ministers, but were represented by a *chargé d' affaires* or a *chargé d' affaires ad interim,* the name of the incumbent and the date of his presentation being given in each of these instances. Portugal had no minister, and the name appears of "Baron d' Almeirim, consul, and acting consul general, in charge of business of legation," and the fact and date of his presentation. Consul General Baiz is alone referred to in a footnote, and is not shown to have been presented. Senor Lainfiesta did not return as minister, and on or about the 10th day of July, 1889, Dr. Fernando Cruz arrived in this country, and was presented by the secretary of state to the president as the envoy extraordinary and minister plenipotentiary of the republic of Guatemala to the United States.

Mr. Baiz answered in the action brought by Hollander, September 25, 1889. On the 3d of October, 1889, counsel for the plaintiff addressed to the state department a letter in which he inquired who was the minister of the state of Guatemala from January to August, 1889; and received an answer under date of October 4, 1889, signed by the second assistant secretary of state, as follows: "I have to acknowledge the receipt of your letter of the 3d inst., and to say in reply that Senor Fernando Cruz presented his credentials as the envoy extraordinary and minister plenipotentiary of Guatemala here, July 11, 1889. Prior to that Senor Lainfiesta was the accredited and recognized minister, but had been for some time absent from the United States. During his absence the business of the legation was conducted by Consul General Baiz, but without diplomatic character." On the 11th of January, 1890, Senor Cruz sent the following communication to the state department: "Mr. Michael H. Cardozo, counsel for Don Jacobo Baiz, in the suit which has been brought against the latter by Mr. J. H. Hollander in New York, presented to your excellency a brief of the facts in the case, and made application to you to be pleased to order that he be furnished with a certain certificate in regard to the character of Mr. Baiz during the absence of Don Francisco Lainfiesta, and until I arrived to take his place. It being urgent to possess this document, since the day approaches to make use thereof, and the government of Guatemala having instruct-

ed Mr. Baiz to make the publication upon which the suit is brought, under the belief that he was its representative in this country from the day of Senor Lainfiesta's departure, I take the liberty of begging your excellency to be pleased to order that the certificate applied for by Mr. Cardozo be issued as soon as possible, and sent to me in order that I may forward it without loss of time." The acting secretary of state replied January 21, 1890, acknowledging the receipt of Senor Cruz's note of the 11th, and continuing thus: "The facts are that on January 16, 1889, Mr. Lainfiesta informed the department of his proposed departure from the United States for Guatemala on a leave of absence. In conveying this information to the secretary of state, Mr. Lainfiesta said: 'In the mean time I beg your excellency to permit Mr. Jacob Baiz, consul general of Guatemala and Honduras at New York, to communicate to the department of state any information connected with the peace of Central America that may be of sufficient importance to be brought without delay to your excellency's notice.' Referring to this note the department, on January 24, 1889, wrote to Mr. Baiz, saying: 'The secretary of state will have pleasure in receiving any communication in relation to Central America, of which you may be made the channel, as intimated by Senor Lainfiesta.' The next communication of the department to Mr. Baiz bears date March 6, 1889, in which he was informed of the accession to office of the present secretary of state, which Mr. Baiz acknowledged on the following day. On April 1st, 1889, the department addressed a communication to Mr. Baiz, 'in charge of the business of the legations of Guatemala, Salvador, and Honduras,' in which he was informed of the recall of Mr. Henry C. Hall as envoy extraordinary and minister plenipotentiary of the United States to the republics of Guatemala, Salvador, and Honduras, and of the appointment by the president, by and with the advice and consent of the senate, of Mr. Lansing B. Mizner to that post. Mr. Baiz was requested to apprise the respective governments of this appointment. This communication Mr. Baiz acknowledged on April 2d, 1889. On May 17th, 1889, Mr. Baiz announced to the department your appointment by the government of Guatemala as its minister plenipotentiary at this capital in place of Mr. Lainfiesta, which was duly acknowledged by the department on the 20th of the same month. Subsequently, correspondence took place between the department and Mr. Baiz in relation to your entrance into the United States, and to your reception as minister. On June 14, 1889, Mr. Baiz inclosed to the department an autograph letter from the president of Guatemala, dated May 20, 1889, to the president of the United States, relative to the recall of Mr. Hall as United States minister to the states of Central America. Of this communica-

tion the department acknowledged the receipt, on June 25, 1889. This, it is believed, is a correct *résumé* of the facts in regard to Mr. Baiz's action as the representative of Guatemala in the absence of her duly accredited minister from the United States."

After the return to the rule, counsel appearing in opposition to granting the writ moved for an order that the petitioner show cause why certain papers presented by him should not be submitted for the consideration of the court in the determination of the matter; and the petitioner, after objecting to the granting of the order, and protesting against the receipt of the papers, submitted certain papers on his part. These papers taken in chronological order are as follows: A letter dated February 2, 1886, from the minister of foreign affairs of the republic of Honduras to Mr. Baiz, transmitting an appointment as *chargé d' affaires* of the republic of Honduras to the government of the United States, and hoping that he will accept said appointment, "filling it to the best interests of the country, endeavoring principally to prevent filibustering expeditions," etc. Accompanying it was a communication addressed to the state department, under date of February 1, 1886, and conveying information of the fact of the appointment. This was presented to Mr. Bayard, then secretary of state, who replied on the 22d of March, 1886, as follows: "Agreeably to the promise made to you in person recently by Assistant Secretary Porter, I have considered the questions involved in your nomination as *chargé d' affaires* of Honduras in the United States. A difficulty arises in the fact stated by you to Mr. Porter, that you are a citizen of the United States. It has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities, and the customary privileges of right attaching to the office of a foreign minister, make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position. The very few past exceptions to this rule have served to show its propriety, especially when, as in your case, it has been sought to supplement the consular functions (which an American citizen may, if otherwise acceptable, hold with perfect propriety) by an added diplomatic rank and function. Were it merely a question of conducting public business with you as the *de facto chargé d' affaires ad interim* during the absence of a regularly accredited envoy of Honduras, there would be little difficulty. In fact, you now stand on that footing for all practical purposes, since the department of state corresponds with you as consul general, upon whatever diplomatic business may arise; but it is to be borne in mind that this is done because the office of the envoy is for the time being

unfilled. Your substitutionary agency is cheerfully admitted, but this is different from recognizing you as invested with the diplomatic character as the incumbent of the mission. While this motive would alone constrain me, although with regret, from acceding to the expressed desire of the government of Honduras, and receiving you as its diplomatic representative, I find another consideration in the phraseology of your official letter of credence." The secretary then considers the objection arising out of the fact that the instrument "announces that the office of *chargé d' affaires* is conferred upon you for the express purpose of negotiating with this government to prevent the organization in the United States of hostile expeditions against Honduras, and causing certain persons named therein to be put under bonds 'not to contrive in any way against the peace of Honduras.'" The letter of credence, and also the letter of the Honduranean minister of foreign relations, were returned. On the 24th day of March, 1886, consul general Baiz acknowledged the receipt of the despatch of the 22d, and said: "I will lose no time to inform the government of Honduras of our correspondence, and that your excellency has kindly consented to admit my substitutionary agency in the absence of the minister, by virtue of my being the consul general. I thank you for this recognition, the extent of which I appreciate; but in order to fully satisfy the goverment of Honduras, which has conferred this honor on me, I take the liberty to ask whether, in the absence of a minister, the state department will consider the consul general *chargé d' affaires ad hoc,* or as diplomatic agent of Honduras, for all practical as well as official purposes, without relieving me of duties and responsibilities incumbent on a citizen of the United States. The declination of the state department of my credentials, on the ground that they express a purpose of a negotiation not admissible under the laws of the United States, will, no doubt, be satisfactory to the government of Honduras." On the 3d day of April, 1886, the secretary of state answered the inquiry of Mr. Baiz in these words: "I have received your letter of the 24th ultimo, in which, after referring to the willingness expressed in my letter to you of the 22d March to admit, in the absence of a minister of Honduras, your substitutionary agency in virtue of your office as consul general, you inquire 'whether, in the absence of a minister, the state department will consider the consul general *chargé d'affaires ad hoc,* or as a diplomatic agent of Honduras, for all practical as well as official purposes, without relieving' you 'of duties and responsibilities incumbent on a citizen of the United States.' In reply, I have to inform you that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case,

as conferring upon you personally any diplomatic status whatever. Your agency is admitted to be such only as is compatible with the continued existence of a vacancy in the diplomatic representation of Honduras in the United States. To recognize you as *chargé d'affaires ad hoc* would be to announce that the vacancy no longer existed, and that diplomatic representation was renewed in your person. It is a common thing to resort to a temporary agency, such as yours, in the conduct of the business of a mission. A foreign minister, on quitting the country, often leaves the affairs of his office in the friendly charge of the minister of another country, but the latter does not thereby become the diplomatic agent of the government in whose behalf he exerts his good offices. The relation established is merely one of courtesy and comity. The same thing occurs when the temporary good offices of a consul are resorted to. In neither case is a formal credence, *ad hoc* or *ad interim*, necessary."

Michael H. Cardozo and Joseph H. Choate, for petitioner. R. D. Benedict, for respondent.

Mr. Chief Justice Fuller, after stating the facts as above, delivered the opinion of the court.

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers and consuls." Const. art. 3, § 2. By section 687 of the revised statutes, it is provided that the supreme court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or a vice-consul is a party." By section 563 it is provided that "the district courts shall have jurisdiction as follows: * * * *Seventeenth.* Of all suits against consuls or vice-consuls," except for certain offenses. The petitioner has been, since July, 1887, the consul general of the republic of Guatemala, and therefore the district court had jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the district court, that at the time of the commencement of the action, and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said republic [of Guatemala] in the United States," and for that reason came within the words of section 687, "other public ministers." The exemption asserted ceased on the 10th of July, 1889, and on the 17th of July the petitioner gave a general

notice of appearance in the action, but did not set up the want of jurisdiction until the 25th of the following September. Suit could have been brought in that court against him on the 11th day of July, but as, in his view, this could not have been done on the 29th of June or the 2d of July, he contends that the district court should be ordered to dismiss the suit, though it could at once be recommended therein. But it is said that the appearance did not waive the right to be sued in this court, rather than in the district court, because that was the privilege of the country or government which he represented. Without pausing to inquire how far this is a correct application of the international privilege of not being sued at all, its assertion, even in this restricted form, serves to emphasize petitioner's contention that he was at that time the minister or diplomatic agent of the republics of Guatemala, Salvador, and Honduras in the United States, intrusted by virtue of his office with authority to represent those republics in their negotiations, and to vindicate their prerogatives. Under section 2, art. 2, of the constitution, the president is vested with power to "appoint ambassadors, other public ministers, and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers." These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents, whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of article 3. These agents may be called ambassadors, envoys, ministers, commissioners, *chargés d'affaires*, agents, or otherwise, but they possess in subtance the same functions, rights, and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence, or dignity. Atty. Gen. Cushing, 7 Ops. Atty. Gen. 186. Hence, when in subdivision 5 of section 1674 of the revised statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents and secretaries of legation, and none others," we understand that to express the view of congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States. But the scope of the words "public ministers" is defined in the legislation embodied in title 47, "Foreign Relations," (Rev. St., 2d Ed., p. 783.) Section 4062 provides that "every person who violates any safe-conduct or passport duly obtained and issued under authority of the United States, or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be

imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a state, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the president, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, "in the service of a public minister," and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed. Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice consul general, consul, or vice-consul." Sections 4062, 4063, 4064, and 4065 were originally sections 25, 26, 27, and 28 of the Crimes Act of April 30, 1790, (1 St. 118,) and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed in Heathfield v. Chilton, 4 Burrows, 2016, the act did not intend to alter and could not alter. In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the prince bishop of Liege, Lord Mansfield said: "I should desire to know in what manner this minister was accredited,—certainly he is not an ambassador, which is the first rank. Envoy, indeed, is a second class, but he is not shown to be even an envoy. He is called 'minister,' 'tis true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, (1 Bl. Comm. 254;) and it was in reference to this that Lord Ellenborough, in Viveash v. Becker, 3 Maule & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempt from ar-

rest on mesne process, remarked: "I cannot help thinking that the act of parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried." Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In U. S. v. Liddle, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the secretary of state, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the secretary of state, Mr. Madison, stated that "when Mr. Feronda produced to the president his credentials as *chargé d'affaires* of Spain, he also introduced De Lima as a gentleman attached to the legation, and performing the duties of secretary of legation;" and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In U. S. v. Ortega, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the secretary of state, informing him that he had appointed Mr. Salmon *chargé d'affaires;* a letter from the minister to Mr. Salmon; a letter from the secretary of state addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the secretary of state addressed to Mr. Salmon as *chargé d'affaires;* and the deposition of the chief clerk of the state department that Mr. Salmon was recognized by the president as *chargé d'affaires,* and was accredited by the secretary of state. In U. S. v. Benner, Baldw. 234, the court was furnished with a certificate from the secretary of state that the Danish minister had by letter informed the department that Mr. Brandis had arrived in this country in the character of *attaché* to the legation, and that said Brandis had accordingly, since that date, been recognized by the department as attached to the legation in that character. These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or *chargé d'affaires* of the

republics of Guatemala, Salvador, and Honduras, in the United States, and so recognized by the state department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute. By the congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised *chargés d'affaires,* who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this government the representatives of the United States have heretofore been ranked in three grades, the third being *chargé d'affaires.* Secretaries of legation act *ex officio* as *chargés d'affaires ad interim,* and in the absence of the secretary of legation the secretary of state may designate any competent person to act *ad interim,* in which case he is specifically accredited by letter to the minister for foreign affairs. Wheaton says: "*Chargés d'affaires,* accredited to the ministers of foreign affairs of the court at which they reside, are either *chargés d'affaires ad hoc,* who are originally sent and accredited by their governments, or *chargés d'affaires per interim,* substituted in the place of the minister of their respective nations during his absence." Int. Law, (8th Ed.) § 215. Ch. de Martens explains that *chargés d'affaires ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. *Chargés d'affaires ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." 1 Guide Diplomatique, p. 61, § 16. "They," observes Twiss, in his Law of Nations, § 192, " are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited." Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, (Calvo, Droit Int. 586,) and among the numerous authorities on international law cited and quoted from by petitioner's counsel the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows: "There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of a diplomatic post. He is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place

he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." 1 Guide Pratique des Consulats, p. 93. That it may sometimes happen that consuls are so charged is recognized by section 1738 of the revised statutes, which provides: "No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to, the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the president so to do." But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul ," observed Mr. Justice Story, in The Anne, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it." When a consul is appointed *chargé d'affaires,* he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *chargé d'affaires,* and not as consul, and, though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Ops. Atty. Gen. 342, 345. This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the consul general of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character because he was also accredited as the "political agent," so-called, of that government, since he was not recognized as performing any acts as such which he was not equally competent to perform as consul general. 1 Whart. Dig. Int. Law, (2d Ed.) § 88, p. 624. We are of the opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, *chargé d'affaires at interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of section 687, and the district court had jurisdiction.

The letter of Senor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz, as *chargé d'affaires ad interim,* nor equivalent to such an appointment. It was a request in terms that the secretary of state would "please allow that the consul general of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the secretary of state any matters relating to the peace of Central America of which that department ought to be informed without delay. This is not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the department would be pleased to receive any communication in relation to Central America of which Consul General Baiz might be made the channel. This reply is addressed to Mr. Baiz, as "Consul General of Guatemala and Honduras," and not as *chargé d'affaires ad interim.* The mere fact that the usual note conveying the information to the legations of Mr. Secretary Blaine's accession chanced to be addressed to "Senor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador, and Honduras," was not a recognition that he was *chargé d'affaires ad interim,* or exercising diplomatic functions; and Mr. Baiz, in acknowledging the receipt of that announcement, properly signs his letter "Counsel General." It may be that such announcements are not sent to any but those exercising diplomatic functions; but this courtesy could not operate as in itself a deliberate recognition of the right to exercise such functions, nor that the person to whom the communication was addressed was in such exercise as a matter of fact. It was entirely proper, since Consul General Baiz was the channel of communication between Guatemala, Honduras, and Salvador, and the state department, that the notification should be sent to him; and even if that course had not been usual, the courtesy could not be availed of to impart a character which the recipient did not otherwise possess. The proofs show that of ten letters from the state department to Mr. Baiz between January 16 and July 10, 1889, two were addressed to him as in charge of the legations, or the business of the legations, of Guatemala, Salvador, and Honduras; two were addressed to him as consul of Honduras; and six as consul general of Guatemala, or Guatemala and Honduras. Of seven letters from Mr. Baiz to the department, one was signed, "Jacob Baiz," and six, "Jacob Baiz, Consul General." The acknowledgment of notice of the accession of the secretary of state, and of the appointment of Mr. Mizner, and the transmission of a letter from the president of Guatemala, and the announcement of the appointment of Minister Cruz, by the consul general, can hardly be regarded as the performance of diplomatic

functions as such. The official circular issued by the department of state, corrected to June 13, 1889, gives the names and description of the *chargés d'affaires ad interim,* in the case of countries represented by ministers who were absent, and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "consul and acting consul general, in charge of business of legation," and the fact of the presentation, with the date, appears in the list; while in the instance of Guatemala, Salvador, and Honduras the name of Mr. Baiz is referred to in a foot-note, with the title of consul general only; nor does it appear, nor is it claimed to be the fact, that he was ever presented. As stated by counsel, Mr. Webster took the ground, in the case of M. Hulsemann, that as *chargé d'affaires* he was not, as a matter of strict right, entitled to be presented to the president; and this is in accordance with the regulations of the state department, (Reg. p. 13.) But such presentation is undeniably evidence of the possession of diplomatic character, and so would be the formal reception of a *chargé d'affaires ad interim* by the secretary of state. The inference is obvious that, if the department of state had regarded Mr. Baiz as *chargé d'affaires ad interim,* or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of *chargé,* or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the secretary of state that he had been recognized by the department of state as *chargé d'affaires ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and, if the state department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the department would not have furnished a certificate to that effect; but, instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient *résumé* of the facts, the letter being in effect a polite declination to give the particular certificate desired because that could not properly be done.

Mr. Baiz was a citizen of the United States, and a resident of the city of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such, and his obligations as a subject or citizen, is considered reason enough in itself. Wheat. Int. Law (8th Ed.) § 210; 2 Twiss, Law Nat. p. 276, § 186; 2 Phillim.

Int. Law, 171. Even an appointment as consul of a native of the place where consular service is required is, according to Phillimore, "perhaps rightfully pronounced, by a considerable living authority, to be objectionable in principle." Volume 2, p. 246, citing De Martens et De Cussey, Rec. de Trait, Index Explicatif, p. 30, tit. "Consuls." "Other powers," says Calvo, (volume 1, p. 559, 2d Ed.,) "admit without difficulty their own citizens as representatives of foreign states, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise the latter might find it impossible to claim the honors, rights, and prerogatives attached to his employment." See, also, Heffter, (3d Fr. Ed.) 387. In the United States the rule is expressed by Mr. Secretary Evarts, under date of September 19, 1879, thus: "This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And, again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country of which he is sent." 1 Whart. Dig. Int. Law (2d Ed.) § 88a, p. 628. Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that, when in 1886 he was appointed *chargé d'affaires* of the republic of Honduras to the government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that "it has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities, and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of

Mr. Baiz, the secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us. The objection which existed in 1886 to the reception of Mr. Baiz as *chargé d'affaires ad hoc* or *ad interim*, or according to him any diplomatic status whatever, whether temporary or otherwise, existed in 1889; and it is out of the question to assume that the state department intended to concede the diplomatic status between January 16 and July 10, 1889, upon the request of Senor Lainfiesta that Consul General Baiz might be allowed to be a medium of communication during his absence, which it had refused to accord to the republic of Honduras itself. It is evident that the statement of the assistant secretary, October 4, 1889, was quite correct, that "the business of the legation (of Guatemala) was conducted by Consul General Baiz, but without diplomatic character."

It is objected that we ought not to have allowed these official papers to come before us, but should have prohibited the district court from exercising jurisdiction, because the evidence that established it had not all been before that court when the question was raised; but the rule governing this class of cases involves no such consequences. The district judge was of opinion that inasmuch as there were two kinds of direct evidence which would show that the defendant was a "public minister," to-wit: (1) A certificate of the secretary of state that he was such, was received as such, and was exercising such functions; or (2) proof of the exercise by the defendant of "the principal diplomatic functions," under some one of the titles of diplomatic office, as recognized by our statute and the law of nations; and as such direct evidence had not been furnished, and the plaintiff was not required to produce his counter-evidence on a motion like that under consideration instead of at the trial,—he was justified in retaining jurisdiction until the issue raised by the pleadings was regularly determined. But to this latter suggestion counsel for petitioner answered in argument: "At any rate, in this court, exercising its appropriate jurisdiction to entertain an application for a writ of prohibition or mandamus, the respondent here is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege." This is undoubtedly the correct view. The question here is whether the district court had jurisdiction, and not whether its order refusing to set aside the service of summons and the subsequent proceedings in the action, and dismissing the same, should be reversed. The practice in prohibition was formerly to file a suggestion, an affidavit in support of which was re-

quired where the prohibition was moved for upon anything not appearing upon the face of the proceedings. Upon a rule to show cause, if it appeared to the court, on cause shown, that the surmise was not true, or not clearly sufficient to ground the prohibition upon, it would be denied, otherwise the rule would be made absolute; or, if the matter were doubtful, the party was ordered to declare, and issue joined on such declaration was regularly tried, being in the nature of an issue to inform the conscience of the court. 2 Sell. Pr. 313, 321, 325. And in mandamus if the case were not governed by the return to the alternative writ, but a traverse of the return was allowed, issues were made up, and a trial had. If the matter can be disposed of upon the rule to show cause, that course may be pursued, but the applicable principles are the same. The alleged want of jurisdiction depends upon questions of fact. It was purely discretionary whether this evidence should be admitted at the time it was presented; and, in a proceeding involving the inquiry under consideration, it was plainly our duty to permit it to come in, the petitioner being afforded, as he was, the opportunity for explanation, and the introduction of such other evidence as he chose to produce. In Ex parte Hitz, 111 U. S. 766, 4 Sup. Ct. Rep. 698, which was an application for a writ of *certiorari,* commanding the supreme court of the District of Columbia to certify to this court an indictment and the proceedings thereunder, on the ground that, when the indictment was filed, and when the offenses therein charged were committed, he was the diplomatic representative of the Swiss Confederation, the court directed a preliminary inquiry, and, in doing so, Mr. Chief Justice Waite said: "As it is conceded that the petitioner is not now in the diplomatic service of Switzerland, and was not when all the proceedings in the supreme court of the District of Columbia subsequent to the indictment were had, counsel are directed to request the secretary of state to certify whether John Hitz was at any time accredited to and recognized by the government of the United States as public or political agent or *chargé d'affaires* of the republic of Switzerland, and, if so, for what period of time, and up to and including what date." The counsel having complied with that request, the court, upon receiving the information as to what the records of the department showed, dismissed the petition.

Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits. We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence we do not assume to sit in judgment

upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the state department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof. Our conclusion is, as already stated, that the district court had jurisdiction, and we accordingly discharge the rule and deny the writs.[1]

BAIZ v. MALO, (1899, U. S.—Columbia)
58 N. Y. Supp. 806.
Gildersleeve, Supreme Court of New York.

[Vice-consul of Columbia by application of the treaty of 1846 receives the benefit of the most favored nation treatment and the application of the provisions of the treaty of 1853 with France, so that he cannot be compelled to attend as a witness. Cites U. S. v. Trumbull, 48 Fed. 96.—ED.]

BALTICA, THE, (1855, Great Britain—Denmark)
1 Spinks Prize Cases 264.
Lushington, High Court of Admiralty.

[Danish consul, Dane by birth, who was merchant at Libau, considered to have Russian nationality and transfer of his ship to avoid seizure invalidated. This decision was reversed later on another point.—ED.]

BARBER, TRUSTEES OF MRS., (1835, Great Britain)
5 L. J. M. S. C. P. 81.
Per Curiam, Court of Common Pleas.

(Syllabus) The certificate required in support of an affidavit of the acknowledgment of a fine by a married woman in a foreign country, may be given by the British consul there resident, as it is a notarial act, within 6 Geo. 4 C. 87 S. 20.

The conusors of this fine being resident in Boston, in America, the acknowledgment was taken before special commissioners, and the affidavit sworn before the Judge of the Municipal Court of Boston. This affidavit was authenticated by the British consul, instead of a notary public[1] in consequence of which the clerk of the enrollments refused to receive the certificate of acknowledgment.

Talfourd, Serj., now moved, that the officers might be directed to receive such certificate, submitting, that the certificate of the consul

[1] From 10 Sup. Ct. Rep. 854.
[1] See Rule, Hilary term, 14 Geo. 3, and Cruttenden v. Bourbell, 1 Taunt. 144.

was a notarial act, which he was empowered to perform by the Stat. 6 Geo. 4 C. 87 S. 20.

The court after some consideration, granted the application.

BARBUIT'S CASE, (1737, Great Britain—Prussia)
Forrester's Cases Temp. Lord Talbot 281.
Talbot, Chancery.

BARBUIT had a commission, as agent of commerce from the King of Prussia in Great Britain, in the year 1717, which was accepted here by the Lords Justices then the King was abroad. After the late King's demise his commission was not renewed until 1735, and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King; and his business described in the commissions was, to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain; to present letters, memorials and instruments concerning trade to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby his Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance Barbuit lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or (281)foreign minister, to be free from arrests.(c) After hearing counsel on this point,

LORD CHANCELLOR. A bill was filed in this Court against the defendant in 1725, upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were over-ruled; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavorable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents, and this arises from the necessity

(c) Vide Triquet and others v. Bath, 3 Burr. 1840. S. P. 1 Black, Rep. 471, S. C.

of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. The question is, whether the defendant is such a person as 7 Anne, cap. 10. describes, which is only declaratory of the ancient universal (*d*) *jus gentium;* the words of the statute (282) are, (ambassadors or other public ministers) and the exception of persons trading relates only to their servants, the parliament never imagining that the ministers themselves would trade. I do not think the words *ambassadors,* or *other public ministers,* are synonymous. I think that the word ambassadors in the act of parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called ambassadors extraordinary; and public ministers in the act take in all others who constantly reside here; and both are entitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same form of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong; but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorized as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to entitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is instructed to transact (283) affairs between the two crowns: the commission is, to assist his Prussian Majesty's sub-

(*d*) Vide 1 Black. Com. 255, where the circumstance which occasioned the making this act is stated at large.

jects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

It is the opinion of Barbeyrac, Wincquefort and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium*, I cannot discharge him. (*e*).

Note: The person was after discharged by the secretary's office, satisfying the creditors.

BECHERDASS AMBAIDASS, THE, (1871, U. S.—Great Britain)
1 Low. 569; Fed. Cases 1,203.
Lowell, District Court.

(Extract) And my opinion is, that justice does not require me to take jurisdiction against the protest of the consul. That objection has weight as showing the opinion of the person who is entrusted with the care of British seamen, that there is no such hardship in this case as required the libellants to be paid here rather than at home. His opinion of the law too must have some weight, because he is in a position to know and act upon it often.

BEE, THE, (1804, U. S.)
Ware, 332; Fed. Cases 1, 219.
Ware, District Court.

[Seems to involve no question about consuls. Salvage case. British consul appeared for the foreign owners.—ED.]

(*e*) In the discussion of this case the court seems to have determined, that a person residing in this country in the capacity of foreign minister, cannot by any act or acts of his own, waive that privilege of protection which the law of nations has annexed to a situation so important. That a foreign minister, being or becoming a trader, does not thereby lose, or forfeit the privilege personally annexed to him; and therefore, the only reason why the court in the present instance did not think the defendant entitled to the protection which he claimed, was, that the employment which he was invested with, could at most be considered only as the same with, or equal to that of consul, which according to the best writers upon the subject, was not entitled to the *Jus Gentium*, or privilege be-

BELGENLAND,[1] THE, (1884, U. S.)
114 U. S. 355; 5 Sup. Ct. Rep. 860.
Bradley, Supreme Court.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRADLEY, J. This case grows out of a collision which took place on the high seas between the Norwegian bark Luna and the Belgian steamship Belgenland, by which the former was run down and sunk. Part of the crew of the Luna, including the master, were rescued by the Belgenland and brought to Philadelphia. The master immediately libeled the steamship on behalf of the owners of the Luna and her cargo, and her surviving crew, in a cause civil and maritime. The libel stated in substance that the bark Luna, of 359 tons, was on a voyage from Porto Rico to Queenstown, or Falmouth, with a cargo of sugar, and when in latitude 44° 33′, and longitude 21° 43′, was met by the steamship Belgenland, end on, between 1 and 2 in the morning, and was run down and sunk by her, only five of her crew escaping; that the light of the steamship was observed right ahead when a mile or more off; that the bark kept her course, as was her duty to do; and that the steamship took no measures to avoid her, but came on at full speed until she struck the Luna; and that the collision was altogether the fault of those in charge of the steamship.

The master of the Belgenland appeared for her owners, and filed an answer, denying that the Luna, at the time of the collision, was sailing on the course alleged, and averred that she was crossing the bows of the steamship, and must have changed her course, and that this was the cause of the collision; that the Luna was not discovered until the instant of the collision, when it was too late to alter the course of the steamship; and that the reason why the bark was not seen before, was that she was enveloped in a shower of rain and mist, and that the steamship was plunging into a heavy head sea, throwing water over her turtle-deck forward. The proctor for the Belgenland, at the time of filing his answer, excepted to the jurisdiction of the court, and stated for cause that the alleged collision took place between foreign vessels on the high seas, and not within the jurisdiction of the United States; that the Belgenland was a Belguim vessel, belonging to the port of Antwerp, in the kingdom of Belgium,

longing to ambassadors or ministers who are entrusted to transact matters of state or other affairs between two nations. That the laws of nations (which in its fullest extent was and formed part of the law of England), was the rule of decision in cases of this kind; and that the act of parliament was declaratory of it, and occasioned by a particular incident.

[1] S. C. 5 Fed. Rep. 86; 9 Fed. Rep. 126. 576, and 16 Fed. Rep. 430.

running a regular line between Antwerp and the ports of New York and Philadelphia; and that the bark Luna was a Norwegian vessel, and that no American citizen was interested in the bark or her cargo. The district court decided in favor of the libelant, and rendered a decree for the various parties interested, to the aggregate amount of $50,278.23. An appeal was taken to the circuit court, which found the following facts, to-wit:

"(1) Between one and two o'clock on the morning of September 3, 1879, in mid-ocean, a collision occurred between the Norwegian bark Luna, on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship Belgenland, on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the bark, in the total loss of the vessel and her cargo, and in the drowning of five of her crew.

"(2) The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The bark was running free, heading S. E. by E. half E., having the wind on her star-board quarter. All her square sails were set except her main-royal, and she carried also her fore, main, and mizzen stay-sails and inner jib. Her yards were braced a little, her main sheet was down, but the weather-clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the top-gallant forecastle, and a capable helmsman was at the wheel. She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on a dark night, and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the bark's nationality, which are the same as those of the British board of trade. About 1.45 o'clock the lookout sighted the white mast-head light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the man at the wheel to 'keep her steady and be very careful,' and the bark held her course. No side lights on the steamer were seen from the bark, but, as the vessels approached each other, the white light of the steamer gradually drew a little on the port bow of the bark for three or four minutes. The mate of the bark seeing the steamer's sails, and that she was heading directly for the bark, was close aboard of her, and reasonably apprehending that a collision was inevitable ordered the bark's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the bark on her port side, cutting her in two obliquely from the after-part of her fore rigging to the fore-part of the main rigging.

"(3) The Belgenland was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain, and the fourth officer. One able seaman was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or top gallant forecastle. The steamer was four hundred and sixteen feet long and about thirty-eight feet beam. The bridge was one hundred and fifty or one hundred and eighty feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about twenty-five feet above the water. The steamer had her fore, main, and mizzen try-sails, fore stay-sails, and jib set and drawing, and probably her jigger also. She heeled to starboard from ten to fifteen degrees.

"(4) The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea, and taking so much water over her bows that he would have been of no use there.

"(5) The bark was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head sails just across the steamer's bow, and the lookout in the lee side of the bridge saw her after-sails and stern.

"(6) The moon was up, but was obscured by clouds. There was no fog, but occasional rain, with mist, and the wind was blowing from the S. W. to W. S. W.

"(7) Objects could be seen at a distance of from five hundred yards to a mile. The mast-head light of the steamer was sighted, and at once reported by the lookout on the bark, at the distance of about a mile; the port light of the bark was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his room-mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck, and reach the steamer's rail; after the collision, the mizzen-mast of the bark was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

"(8) The damages caused by the collision were assessed at $50,248.23."

Upon these facts the court below deduced the following conclusions:

"(1) That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

"(2) That the lookout on the bark saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported, it was at a time and under circumstances which did not involve any culpability on her part.

"(3) That it was the duty of the steamer to keep out of the way of the bark, and, to that end, so to change her course as to preclude all danger of collision.

"(4) That the bark could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the bark enough sea-room to avert any risk of collision. In this failure to observe the bark the steamer was negligent.

"(5) No satisfactory or sufficient reason is furnished by the respondents' evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore try-sail, she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, it was the steamer's duty to reduce her speed, and to place a lookout on her turtle-back. An omission to observe these precautions was negligence. But, considering the proof that the bark held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient."

A decree was thereupon entered, affirming the decree of the district court in favor of the libelants for the sum of $50,748.23, with interest from March 25, 1881, amounting to $51,954.14, and costs. A reargument was had on the question of jurisdiction, and the court held and decided that the admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction. The case is now before us on appeal from the decree of the circuit court.

The first question to be considered is that of the jurisdiction of the district court to hear and determine the cause. It is unnecessary here, and would be out of place, to examine the question which

has so often engaged the attention of the common-law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. It is very fully discussed in Mostyn v. Fabrigas, and the notes thereto in 1 Smith, Lead. Cas. 765; and an instructive analysis of the law will be found in the elaborate arguments of counsel in the case of the San Francisco Vigilant Committee, (Molony v. Dows, 8 Abb. Pr. 316,) argued before Judge Daly in New York, 1859. We shall content ourselves with inquiring what rule is followed by courts of admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libeled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British-born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But, it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the mean time, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or, conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium,* and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit,* to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question of such nature, so to be determined." The Two Friends, 1 C. Rob. 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris,* and are *prima facie* proper subjects of inquiry in

any court of admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious or injured parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804. Mason v. The Blaireau, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in The Two Friends. Chief Justice Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he, "respecting the jurisdiction of the court, and, upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In that case, the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence its discretion in taking jurisdiction. For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that, from motives of convenience, or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: The Catharina, 1 Pet. Adm. 104; The Forsoket, Id. 197; The St. Oloff, 2 Pet. Adm. 428; The Golubchick, 1 Wm. Rob. 143; The Nina, L. R. 2 Adm. & Ecc. 44; S. C. on appeal, L. R. 2 Priv.

C. 38; The Leon XIII. 8 Prob. Div. 121; The Havana, 1 Spr. 402; The Becherdass Ambaidass, 1 Low. 569; The Pawashick, 2 Low. 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. The Elwine Kreplin, 9 Blatchf. 438; reversing, S. C. 4 Ben. 413; see S. C. on application for *mandamus, ex parte* Newman, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign states. See Treaties and Conventions, (Ed. 1871,) Index, p. 1238.

In the absence of such treaty stipulations, however, the case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed, also, with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects as to matters of contract or tort solely affecting themselves, and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage case of this kind came before the United States district court of New York in 1848. The master and crew of a British ship found another British ship near the English coast, apparently abandoned, (though another vessel was in sight,) and took off a portion of her cargo, brought it to New York, and libeled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and Judge Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. One Hundred and Ninety-four Shawls, 1 Abb. Adm. 317.

So in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. The Agincourt, L. R. 2 Prob. Div. 239. But in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. The Evangelistria, L. R. 2 Prob. Div. 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*,—that is, where they arise under the common law of nations,—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it. See 2 Pars. Shipp. & Adm. 226, and cases cited in notes. In the case of The Jerusalem, 2 Gall. 191, decided by Mr. Justice Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case, Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an admiralty court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitae*. He added: "With reference therefore to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and Justice Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules." Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of The Golubchick, 1 Wm. Rob. 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839 a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English admiralty. The Johann Friederich, 1 Wm. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libeled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington, who, among other things, remarked: "An alien friend is entitled to sue [in our courts] on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus,* no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris;* but in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners, is whether the case be *communis juris* or not. * * * If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost; for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress.

In the subsequent case of The Griefswald, Swab. 430, decided by the same judge in 1859, which arose out of a collision between a British bark and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European states and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own admiralty courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. It was exercised in two cases of collision coming before Mr. Justice Blatchford, while district judge of the Southern District of New York: The Jupiter, 1 Ben. 536, and The Russia, 3 Ben. 471. In the former case, the law was taken very much for granted; in the latter, it was tersely and accurately expounded, with a reference to the principal authorities. Other cases might be referred to, but it is unnecessary to cite them. The gen-

eral doctrine on the subject is recognized in the case of The Maggie Hammond, 9 Wall. 435, 457, and is accurately stated by Chief Justice Taney in his dissenting opinion in Taylor v. Carryl, 20 How. 611.

As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England, that of The Leon XIII. L. R. 8 Prob. Div. 121, the subject was discussed in the court of appeal. That was the case of a Spanish vessel libeled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the admiralty court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and, under the circumstances, he considered the protest a proper one, and dismissed the suit. The court of appeal held that the judge below was right in regarding the libelants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, M. R., said: "It is then said that the learned judge has exercised his discretion wrongly. What, then, is the rule as regards this point in the court of appeal? The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the court of appeal holds, that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overule his discretion."

This seems to us to be a very sound view of the subject; and, acting on this principle, we certainly see nothing in the course taken by the district court, in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady

very justly said, in a case before him in the district of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found." Bernhard v. Creene, 3 Sawy. 230, 235.

As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted. This rule is laid down in many cases; among others the following: The Johann Friederich, 1 Wm. Rob. 35; The Dumfries, Swab. 63; The Zollverein, Id. 96; The Griefswald, Id. 430; The Wild Ranger, Lush. 553; The Belle, 1 Ben. 320; The Scotia, 14 Wall 171; The Scotland, 105 U. S. 24, 29; The Leon, 6 Prob. Div. 148. In the case last cited, which was that of a British ship run down by the Leon, a Spanish ship, the question was specifically raised by the respondents, (the owners of the Leon,) who set up in defense that if there was any negligence in her navigation, her master and crew, and not her owners, were liable by the Spanish law. This defense was overruled, and the general maritime law, as understood and administered in England, was held to govern the case; by which law the owners were held responsible. The same rule was followed by this court in The Scotland, and was applied to the collision of a British with an American ship on the high seas; although, it is true, we applied to that case the rule of limited liability established by the act of congress, regarding that act as declarative of the general maritime law to be administered by our courts.

The rule requiring the application of the general maritime law to such cases has some qualifications, which, though not affecting the present case, should always be borne in mind. One of these qualifications is that the persons in charge of either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas, because they are bound to obey such regulations. The Scotia, 14 Wall. 170, 184. Another qualification is that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as

respects the parties concerned, it is the maritime law which they mutually acknowledge. The Scotland, 105 U. S. 24, 31.

The first of these qualifications can rarely be called into requisition at the present day, since, for more than 20 years past, all the principal maritime nations of the world (at least, those whose vessels navigate the Atlantic ocean) have concurred in adopting a uniform set of rules and regulations for the government of vessels on the high seas. These rules and regulations have become international, and virtually a part of the maritime law. The Scotia, 14 Wall. 171, 187. They will be presumed to be binding upon foreign as well as domestic ships unless the contrary is made to appear.

We are then brought to the question of the merits of the case between the parties as shown by the pleadings and finding of facts. And this does not require any extended discussion. It is shown that the bark had her proper lights burning brightly, visible on a dark night, and with a clear atmosphere, at least two miles; and that, in character and location, they conformed to the regulations of the bark's nationality, which are the same as those of the British board of trade, (or the international rules before referred to;) that the mast-head light of the steamer was sighted right ahead, distant about a mile; that the bark was kept steady on her course until the steamer was almost upon her and apparently about to run her down; that then the order was given to put the helm hard a-port; that in a few seconds the steamer's starboard light came in view, and in another instant she struck the bark in her port side, cutting her in two obliquely. In all this we see nothing that the people in charge of the bark did which it was not their duty to do by the international rules. It was their duty to keep her steady on her course, and it was the duty of the steamer to see the bark and to avoid a collision.

On the other side, it appears that the steamer, which was a large and powerful one, 416 feet long and 38 feet beam, was coming towards the bark, end on, at about 11 knots an hour; that she had a lookout on the lee side of her bridge, (which was over 150 feet from her bow,) where the officer in charge of the deck also was, but had no other lookout on duty. The rest of the watch, except the man at the compass and one at the wheel, were underneath the turtle-back, or top-gallant forecastle. No lookout was on the turtle-back, although it would have been entirely safe to station one there. The omission to do so was for the alleged reason that the vessel was plunging into a head-sea, and taking so much water over her bows that he would have been of no use there. The bark was not seen by those in charge of the steamer until just at the instant of the collision; yet objects could be seen at a distance of from 500 yards to a mile, and the port light of

the bark was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and was reported to his roommates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion-ladder, cross the deck, and reach the steamer's rail.

We think that these facts furnished a sufficient ground for the conclusions at which the court arrived, as before rehearsed; the substance of which was that the collision occurred by the negligence of those having charge of the Belgenland, in not seeing the bark, and in not taking the proper precautions due to such a night and such a sea, by reducing speed and keeping a sufficient lookout.

It is argued that there is no express finding of negligence or fault, as matter of fact, but only as an inference from the facts found. But we think that the facts found furnish such conclusive proof of negligence that it may be regarded as properly found among the conclusions of law as a legal inference from those facts. U. S. v. Pugh, 99 U. S. 265. The counsel of the appellants suppose that the court below found the Belgenland in fault on the mere presumption arising from the fact of collision, and the primary duty of the steamship to avoid it. But this is not a just view of the decision. There was much more in the facts of the case than the existence of such a presumption, as the foregoing rehearsal of the facts clearly shows. The ability to see objects at a distance; the fact that the men in charge of the steamer failed to see the bark, while a passenger did see her from his room; the fact that there was but one lookout for such a large steamer; that other lookouts could have been stationed on the turtle-back; the fact that the speed was not slackened, and no precautions taken to get a better view ahead;—these facts, in addition to the presumption arising from the steamer's duty, present a very different case from that supposed by the appellants. The decision of the court must be taken as the collective result from the whole case. It cannot be judged from mere isolated expressions in the opinion.

The rule contended for by the appellants, that negligence and fault must be proved, and not presumed, is undoubtedly a sound one, and hardly needs cases to support it. But the circuit court evidently did not rest the case on presumption, but upon proof, from which it properly deduced negligence on the part of the steamship. At all events, this court, upon a careful consideration of the facts found, is satisfied that there was such negligence, and that it was the cause of the catastrophe.

The decree of the circuit court is affirmed, with interest to be added to the amount from the date of the same.[1]

[1] From 5 Sup. Ct. Rep. 860.

BELLO CORRUNES, (1821, U. S.—Spain)
6 Wheat. 152.
Johnson, Supreme Court.

* * * * * * * * *

The attorney-general, for the United States, argued, that the officers of the government being in (156) possession of this property, would hold it as a *droit* until some person appeared duly authorized to claim it. The consul of Spain has no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot therefore have been vested with a special procuration. He is not invested with a general authority for that purpose, *virute officii*, nor is there evidence in this particular case that the consul is the agent, consignee, or correspondent of the owners, who are sometimes permitted to claim for their principal, when the latter is absent from the country. Great public inconveniences and mischief might (157) follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property, for which they may interpose a claim as belonging to their fellow-subjects.

* * * * * * * * *

(161) Mr. Webster and Mr. Wheaton, for the respondent and claimant, the Spanish consul, contended, that the consul, from the necessity of the case, had a right to interpose a claim for the property of his fellow-subject, brought into our ports in this manner. He does not claim as attorney in fact, but his character is more like an attorney at law. There is no necessity of a special procuration from those for whom he claims, because it does not follow that the property will be actually delivered into his hands until the respective rights of the owners are determined, and a special authority produced from them to receive distribution. There is the more necessity for permitting the consul, as the official protector of the commercial rights and interests of his fellow-subjects in a foreign country, to interpose a claim in a case of this nature, because the usual term of a year and a day allowed in prize causes, where there is no claim, would not be allowed here, since the property is demanded by the captors under their pretended commission, and if the subjects of Spain, residing at a distance, and ignorant even of the fact of the capture, were not allowed to be represented by their consul, the property would be taken away by the captors, and irrevocably lost to the original owners. It will also frequently be impossible for the consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The opinion of M. Portalis on the case of The Danish Consul, proceeds entirely upon the

peculiar (162) regulation of France, which makes the procureur-general, the official attorney of all persons who are not represented before the tribunals by any special procuration; which would, of course, render unnecessary the interposition of foreign consuls in cases where the rights of their countrymen were involved.

* * * * * * * * *

Mr. Justice Johnson delivered the opinion of the court: (Extract) To these several claims it is objected on behalf of the United States, that restitution cannot be decreed to the Spanish vice-consul because he is not in that capacity a competent party in court to assert the rights of the individual subject; nor, in favor of the captors, because the privateer was originally fitted out in the United States, and is still owned by American citizens; nor, in favor of the salvors, because (168) they have forfeited their claim to salvage by spoliation, and an attempt to smuggle.

As these suggestions open the whole case, it shall be disposed of by considering them severally in their order, only remarking, *en passant*, that though they are all sustained, it would avail the United States nothing: since, without evidence sufficient to sustain the criminal charge, it would only follow that the proceeds of the property libeled must lie in the registry of the court until a proper claimant shall make his appearance.

On the first point made by the attorney-general, this court feels no difficulty in deciding, that a vice-consul duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall in any instance extend to the right to receive, in his national character, (169) the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of

the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point. Considering, then, the original Spanish interest as legally represented, the questions are, whether that interest is not forfeited to the United States, or superseded by the superior claims of the capturing vessel.

BENITO ESTENGER, THE, (1900, U. S.)
176 U. S. 568.
Fuller, Supreme Court.

(Extract) Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of any enemy from capture and confiscation.

BENSON v. McMAHON, (1887, U. S.—Mexico)
127 U. S. 457.
Miller, Supreme Court.

[Case in which the Mexican consul-general at New York secures the commitment for extradition.—ED.]

BERNARD v. CREENE, (1874, U. S.—Great Britain)
3 Sawy. 230; Fed. Cases 1,349.
Deady, District Court.

(235) (Extract) As to the protest of the vice-consul, I do not find in it any sufficient reason for declining the jurisdiction. He is not the representative of the libellants, nor authorized to speak for their governments, because they are not British subjects. Practically they are residents of and domiciled in this country. They came here from the Argentine Republic on a voyage which, as to them, terminated here. The parties can not be remitted to a home forum, for being subjects of different governments there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found. Such is this court.

Neither is the probable detention of the vessel any reason why this court should decline to do justice to these suitors. If the owners have committed their vessel to the care of a master and mate who are detained in foreign ports to an-**(236)**swer for injuries done to third persons, it is their misfortune—it may be their fault—certainly it is no fault of these libellants, and they ought not to suffer for it or be delayed or hindered on account of it, in seeking redress for their alleged wrongs.

The court which the consul is about to organize, to inquire into these matters, has not yet been organized, and if it was a case of concurrent jurisdiction, the jurisdiction of this court having first attached would be thenceforth exclusive. But this consular court, or rather "naval court," as it is called in the regulations, has no jurisdiction over this claim of the libellants or power to give them relief. It is a court or board of inquiry, convened for the purpose of ascertaining whether certain crimes against British law have been committed on the vessel, and if so, send the accused parties, with the witnesses, home for trial. Suppose this naval court find that the defendants were guilty of an aggravated assault or assaults upon the libellants, and is able to send them home for trial, how does that affect the claim of the libellants? The defendants may be required to answer both *civiliter* and *criminaliter* for acts injurious to others. In the one case, the proceeding is a civil suit by the party injured for damages for the injury. In the other, it is a prosecution by the public to punish the party for the commission of an offense against society. The trial of this suit in this court in no way "calls in question the official action" of such naval court, even if it had already taken action in the premises. For the purpose of which it will inquire into the conduct of the defendants towards these libellants, this court has no right to take cognizance of the matter. On the other hand, concerning the redress sought to be obtained by this suit against the defendants on account of such conduct, that tribunal has neither duty nor authority.

In Patch v. Marshall, 1 Curtis, 452, the court took jurisdiction of a libel for a tort by a seaman against the master of a British vessel, notwithstanding the protest of the British consul: "That an investigation of some of the alleged causes of damages must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government." In passing upon this point, the court, Curtis, J. (p. 455), says: "It is true this court should not call in question a British consul for his official acts respecting the crew of a British vessel in a foreign port. * * * But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen, by imprisonment in a foreign jail, is not to be here investigated."

Upon the whole, I think this is a very clear case in favor of exercising the jurisdiction. In the language of Patch v. Marshall, *supra*, "to require these libellants to follow these defendants over the world, until they can find them in a British port would practically deprive them of all remedy. I do not think any considerations of public con-

venience, or the comity extended by the courts of admiralty of one country to those of another, have any applicability to such a case."

The protest and exceptions are overruled.

BETTY CATHCART, THE, (1799, Great Britain)
1 Rob. C. 220.
Sir William Scott, High Court of Admiralty.

(221) (Extract) The ship had been a British vessel taken by the French and carried into an American port. The British consul interposed, and the subordinate court in America determined, in perfect consistence with the laws of neutrality, that it was a capture unlawfully made in violation of their particular neutrality, and restored the vessel. An appeal was prosecuted to the superior court, and it was agreed, to prevent the destruction of the vessel by its rotting in a harbor during the pendency of this appeal, that the ship should be sold and the proceeds should remain to abide the event of the ultimate adjudication. In this state the vessel was purchased by a Mr. Penman of Charles-Town, according to his declaration, for the former owners, if they elected to take it; otherwise for Simpson and Davidson, British merchants, correspondents of his in London, in whose names and on whose account it was actually purchased. Mr. Penman then applied, by means of the British consul, who witnesses the whole of the transaction, to the French consul for the ship's register and other documents. The French consul refused. Application was made to the American court which had decreed the sale, to compel a delivery of the British papers, but the American court declined interfering to that effect, upon the application of the British consul, who certifies the fact, and puts his certificate on board, stating what had passed, and that the "ship is and continues a British bottom, and that he does this for the security of British owners." The ship, thus deprived of her papers, sails * * *.

BIRD, EX PARTE, (1802, Great Britain)
2 D. M. & G. 963; 42 Eng. Rep. 1148.
Lord Justices, Chancery.

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A question arose in this case as to the sufficiency of an affidavit under the 243d section of the Bankrupt Law Consolidation Act, 1849, which, after providing that affidavits to be made or used in matters of bankruptcy, or in any matter or proceeding whatever under the act, shall and may be sworn in England, Scotland, or Ireland, as there mentioned, proceeds thus: "or elsewhere, before a magistrate

and attested by a notary, or before a British minister, consul, or vice-consul."

The affidavit purported to be sworn before a magistrate at New York, and there was a notarial certificate that the gentleman described in the jurat as a magistrate actually filled that office.

Mr. Hugh Hill and Mr. Selwyn, for the respondent, objected that the affidavit was not "attested" by a notary, inasmuch as it did not appear that the notary was present when the affidavit was sworn.

Mr. Rolt and Mr. Eddis, for the appellant.

THE LORD JUSTICE KNIGHT BRUCE thought the attestation sufficient.

THE LORD JUSTICE LORD CRANWORTH asked if there was any settled practice of authority upon the point; (964) and being informed that none had been found, his Lordship said that if there were no precedent the court would make one in this case. That such a form of attestation was sufficient appeared plain. The legislature intended that affidavits should be sworn before some functionary duly authorized to receive them, and that where such functionary was a foreign functionary, the fact of his authority should be attested by the certificate of a notary. Where affidavits were made before a British minister, consul, vice-consul, no notarial certificate was requied; and the reason for that was, because the fact of such persons filling their respective offices was easily capable of proof, independently of any material attestation or certificate.

BISCHOFFSCHEIM v. BALTZER, (1882, U. S.)
10 Fed. Rep. 1.
Blatchford, Circuit Court.

(Extract) Under sections 863 and 1750 of the Revised Statutes, depositions *de bene esse* in civil causes may be taken in a foreign country by any secretary of legation or consular officer.

BIXBY v. JANSSEN, (1869, U. S.)
6 Blatchf. 315; Fed. Cases 1,452.
Blatchford, Circuit Court.

This was an action on contract, tried before the court without a jury.

Spaulding & Richardson, for the plaintiff.

Henry D. Lapaugh, for the defendants.

BATCHFORD, J. I do not think, on the evidence, that the firm

of Janssen, Schmidt & Ruperti is liable to the plaintiff for the claim sued for. I think, however, that the persons who composed the former firm of J. W. Schmidt & Co., on the 23d of February, 1865, are liable for it. Those persons were John W. Schmidt, Edward Vonderheydt, and the defendant Janssen. The defendant Schmidt, who is consul in the United States for the kingdom of Saxony, was not a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865. He became such in March, 1865. It is only by reason of his being a foreign consul that this court has any jurisdiction of this action. The defendant Janssen was a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, and, as such, is liable to the plaintiff for the claim sued for, according to the written memorandum of that date; but, as the firm of Janssen, Schmidt & Ruperti, as a firm, is not liable for the claim, and there can be no recovery in this suit against the defendant Schmidt, the consul, the jurisdiction of the court to give judgment against Janssen fails, he having been properly sued in this court only as a copartner with the defendant Schmidt, and being, in fact, sued only as a member of the firm of Janssen, Schmidt & Ruperti, and his liability as such copartner not being established. Janssen, though liable, as a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, for this claim, must be sued for it in a state court.

I, therefore, find for the defendants.

BLANCHE v. RANGEL, see The Nina.

BORS v. PRESTON, (1884, U. S.)
111 U. S. 252; 4 Sup. Ct. Rep. 407.
Harlan, Supreme Court.

In error to the circuit court of the United States for the Southern District of New York.

HARLAN, J. This action was brought in the circuit court of the United States for the Southern District of New York. The plaintiff, Preston, is a citizen of that state, while the defendant is the consul, at the port of New York, for the kingdom of Norway and Sweden. The object of the action is to recover damages for the alleged unlawful conversion by defendant, to his own use, of certain articles of merchandise. The answer denies the material allegations of the complaint, and, in addition, by way of counter-claim, asks judgment against the plaintiff for certain sums. To the counter-claim a replication was filed, and a trial had before a jury, which resulted in a

verdict in favor of plaintiff for $7,313.10. For that amount judgment was entered against the defendant.

The assignments of error question the jurisdiction of the circuit court, under the constitution and the laws of the United States, to hear and determine any suit whatever brought against the consul of a foreign government. Some reference was made in argument to the fact that the defendant did not in the court below plead exemption, by virtue of his official character, from suit in a circuit court of the United States. To this it is sufficient to reply that this court must, from its own inspection of the record, determine whether a suit against a person holding the position of consul of a foreign government is excluded from the jurisdiction of the circuit courts. In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances declined to express any opinion upon the merits on appeal or writ of error where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption, in every stage of the cause, is that it is without their jurisdiction, unless the contrary appears from the record. Grace v. American Ins. Co. 109 U. S. 283; S. C. 3 Sup. Ct. Rep. 207; Robertson v. Cease, 97 U. S. 646. Much more, therefore, will we refuse to determine on the merits, and will reverse on the point of jurisdiction, cases where the record shows affirmatively that they are of a class which the statute excludes altogether from the cognizance of the circuit courts. If this were not so it would be in the power of the parties, by negligence or design, to invest those courts with a jurisdiction expressly denied to them. To these considerations it may be added that the exemption of the consul of a foreign government from suit in particular courts is the privilege, not of the person who happens to fill that office, but of the state or government he represents. It was so decided in Davis v. Packard, 7 Pet. 284. While practically it may be of no consequence whether original jurisdiction of suits against consuls of foreign governments is conferred upon one court of the United States rather than another, it is sufficient that the legislative branch of the government has invested particular courts with jurisdiction in the premises.

We proceed, then, to inquire whether, under the constitution and laws of the United States, a circuit court may, under any circumstances, hear and determine a suit against the consul of a foreign government. In other words, whether other courts have been invested with exclusive jurisdiction of such suits. The constitution declares that "the judicial power of the United States shall extend * * *

to all cases affecting ambassadors or other public ministers and consuls;" to controversies between citizens of a state and foreign citizens or subjects; that "in all cases affecting ambassadors, other public ministers and consuls, * * * the supreme court shall have original jurisdiction;" and that in all other cases previously mentioned in the same clause, "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." The judiciary act of 1789 invested the district courts of the United States with "jurisdiction, exclusively, of the courts of the several states, of all suits against consuls or vice-consuls," except for offenses of a certain character; this court with "original, but not exclusive jurisdiction of all suits * * * in which a consul or vice-consul shall be a party;" and the circuit courts with jurisdiction of civil suits in which an alien is a party. 1 St. 76-80. In this act we have an affirmance by the first congress—many of whose members participated in the Convention which adopted the constitution, and were therefore conversant with the purposes of its framers—of the principle that the original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments. On a question of constitutional construction, this fact is entitled to great weight. Very early after the passage of that act the case of U. S. v. Ravara, 2 Dall. 297, was tried in the circuit court of the United States for the district of Pennsylvania, before Justices Wilson and Iredell, of this court, and the district judge. It was an indictment against a consul for a misdemeanor of which, it was claimed, the circuit court had jurisdiction under the eleventh section of the judiciary act, giving circuit courts "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein." In behalf of the accused it was contended that this court, in virtue of the constitutional grant to it of original jurisdiction in all cases affecting consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the district judge concurred in overruling this objection. They were of opinion that although the constitution invested this court with original jurisdiction in cases affecting consuls, it was competent for congress to confer concurrent jurisdiction in those cases upon such inferior courts as might by law be established. Mr. Justice Iredell dissented, upon the ground that the word "original," in the clause of the

constitution under examination, meant exclusive. The indictment was sustained, and the defendant upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.

In U. S. v. Ortega, 11 Wheat. 467,—which was a criminal prosecution, in a circuit court of the United States, for the offense of offering personal violence to a public minister, contrary to the law of nations and the act of congress,—one of the questions certified for decision was whether the jurisdiction conferred by the constitution upon this court, in cases affecting ambassadors or other public ministers, and consuls, was not only original, but exclusive of the circuit courts. But its decision was waived and the case determined upon another ground. Of that case it was remarked by Chief Justice Taney, in Gittings v. Crawford, Taney, Dec. 5, that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions.

In Davis v. Packard, *ubi supra*, upon error to the court for the correction of errors of the state of New York, the precise question presented was whether, under the constitution and laws of the United States, a state court could take jurisdiction of civil suits against foreign consuls. It was determined in the negative upon the ground that, by the ninth section of the act of 1789, jurisdiction was given to the district courts of the United States, exclusively of the courts of the several states, of all suits against consuls and vice-consuls, except for certain offenses mentioned in the act. The jurisdiction of the state courts was denied because—and no other reason was assigned—jurisdiction had been given to the district courts of the United States exclusively of the former courts,—a reason which, probably, would not have been given had the court, as then organized, supposed that the constitutional grant of original jurisdiction to this court, in all cases affecting consuls, deprived congress of power to confer concurrent original jurisdiction, in such cases, upon the subordinate courts of the Union. It is not to be supposed that the clause of the constitution giving original jurisdiction to this court, in cases affecting consuls, was overlooked, and therefore the decision in that case may be regarded as an affirmance of the constitutionality of the act of 1789, giving original jurisdiction in such cases also to district courts of the United States. And it is a significant fact that in the decision in Davis v. Packard, Chief Justice Marshall concurred, although he had delivered the judgments in Marbury v. Madison, 1 Cranch, 137, 1; Cohens v. Virginia, 6 Wheat. 264; and Osborn v. U. S. Bank, 9 Wheat. 738, some of the general expressions in which are not infrequently cited in support of the broad proposition that the jurisdiction

of this court is made by the constitution exclusive of every other court, in all cases of which by that instrument it is given original jurisdiction. It may also be observed that of the seven justices who concurred in the judgment in Davis v. Packard, five participated in the decision of Osborn v. U. S. Bank.

In St. Luke's Hospital v. Barclay, 3 Blatchf. 259, which was a suit in equity in the circuit court of the United States for the Southern district of New York, the question was distinctly raised whether the consular character of the alien defendant exempted him from the jurisdiction of the circuit courts. The jurisdiction of the circuit court was maintained, the opinion of the courts being that the jurisdiction of the district court was made by statute exclusive only of the state courts, and that under the eleventh section of the act of 1789, the defendant being an alien,—no exception being made therein as to those who were consuls,—was amendable to a suit in the circuit court brought by a citizen. Subsequently the question was reargued before Mr. Justice Nelson and the district judge, and the proposition was pressed that the defendants could not be sued except in this court or in some district court. But the former ruling was sustained.

In Graham v. Stucken, 4 Blatchf. 50, the same question was carefully considered by Mr. Justice Nelson, who again held that the constitutional grant of original jurisdiction to this court in cases affecting consuls; the legislative grant in the act of 1789 to this court of original but not exclusive jurisdiction of suits in which a consul or vice-consul is a party; and the legislative grant of jurisdiction to the district courts, exclusive of the state courts, of suits against consuls or vice-consuls,—did not prevent the circuit courts, which had jurisdiction of suits to which an alien was a party, from taking cognizance of a suit brought by a citizen against an alien, albeit the latter was at the time the consul of a foreign government.

In Gittings v. Crawford, Taney, Dec. 1, which was a suit upon a promissory note brought in the district court of the United States for Maryland, by a citizen of that state against a consul of Great Britain, the point was made in the circuit court on writ of error that by the constitution of the United States this court had exclusive jurisdiction of such cases. The former adjudications of this and other courts of the Union were there examined and the conclusion reached—and in that conclusion we concur—that as congress was not expressly prohibited from giving original jurisdiction, in cases affecting consuls to the inferior judicial tribunals of the United States, neither public policy nor convenience would justify the court in implying such prohibition, and upon such implication pronounce

the act of 1789 to be unconstitutional and void. Said Chief Justice Taney: "If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter." Taney, Dec. 9. After alluding to the fact that the position of consul of a foreign government is sometimes filled by one of our own citizens, he observes: "It could hardly have been the intention of the statesmen who framed our constitution to require that one of our citizens who had a petty claim of even less than five dollars against another citizen who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offense that might be committed by a consul in any part of the United States; that consul, too, being often one of our own citizens."

Such was the state of the law when the Revised Statutes of the United States went into operation. By section 563 it is provided that "the district courts shall have jurisdiction * * * of all suits against consuls or vice-consuls," except for certain offenses; by section 629, that "the circuit courts shall have original jurisdiction" of certain classes of cases, among which are civil suits in which an alien is a party; by section 687, that this court shall have "original but not exclusive jurisdiction of all suits * * * in which a consul or vice-consul is a party;" and by section 711, that the jurisdiction vested in the courts of the United States in the cases and proceedings there mentioned—among which (paragraph 8) are "suits against ambassadors or other public ministers or their domestics, or domestic servants, or against consuls, or vice-consuls"—shall be exclusive of the courts of the several states. But by the act of February 18, 1875, that part of section 711 last quoted was repealed, (Supp. Rev. St. p. 138, par. 18,) so that, by the existing law, there is no

statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the state courts in suits against consuls or vice-consuls. It is thus seen that neither the constitution nor any act of congress defining the powers of the courts of the United States has made the jurisdiction of this court, or of the district courts, exclusive of the circuit courts in suits brought against persons who hold the position of consul, or in suits or proceedings in which a consul is a party. The jurisdiction of the latter courts, conferred without qualification, of a controversy between a citizen and an alien, is not defeated by the fact that the alien happens to be the consul of a foreign government. Consequently the jurisdiction of the court below cannot be questioned upon the ground simply that the defendant is the consul of the kingdom of Norway and Sweden.

But as this court and the district courts are the only courts of the Union which, under the constitution or the existing statutes, are invested with jurisdiction without reference to the citizenship of the parties, of suits against consuls, or in which consuls are parties, and since the circuit court was without jurisdiction, unless the defendant is an alien or a citizen of some state other than New York, it remains to consider whether the record shows him to be either such citizen or an alien. There is neither averment nor evidence as to his citizenship, unless the conceded fact that he is the consul of a foreign government is to be taken as adequate proof that he is a citizen or subject of that government. His counsel insist that the consul of a foreign country, discharging his duties in this country, is, in the absence of any contrary evidence, to be presumed in law to be a citizen or subject of the country he represents. This presumption, it is claimed, arises from the nature of his office and the character of the duties he is called upon to discharge. But, in our opinion, the practice of the different nations does not justify such presumption. "Though the functions of consul," says Kent, "would seem to require that he should not be a subject of the state in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual, and thought most convenient, to appoint subjects of the foreign country to be consuls at its ports." 1 Kent, 44. In Gittings v. Crawford, *ubi supra*, it was said by Chief Justice Taney that, "in this country, as well as others, it often happens that the consular office is conferred by a foreign government on one of our own citizens." It is because of this practice that the question has frequently arisen as to the extent to which citizens of a country, exercising the functions of foreign consuls, are exempt from the political and municipal duties which are imposed upon their fellow citizens. Halleck, Int. Law, (London Ed.,) vol. 1, c. 11, § 10 *et seq.* In an elaborate

opinion by Attorney General Cushing, addressed to Secretary Marcy, the question was considered whether citizens of the United States, discharging consular functions here by appointment of foreign governments, were subject to service in the militia or as jurors. 8 Op. Atty. Gen. 169. It was, perhaps, because of the difficulties arising in determining questions of this character that many of the treaties between the United States and other countries define with precision the privileges and exemptions given to consuls of the respective nations—exemptions from public service being accorded, as a general rule, only to a consul who is a citizen or subject of the country he represents. Rev. St. D. C. Pub. Treaties, index, tit. "Consuls."

But it seems unnecessary to pursue the subject further. When the jurisdiction of the circuit court depends upon the alienage of one of the parties, the fact of alienage must appear affirmatively either in the pleadings or elsewhere in the record. Brown v. Keene, 8 Pet. 115; Bingham v. Cabot, 3 Dall. 382; Capron v. Van Noorden, 2 Cranch, 126; Robertson v. Cease, *supra*. It cannot be inferred, argumentatively, from the single circumstance that such person holds and exercises the office of consul of a foreign government. Neither the adjudged cases nor the practice of this government prevent an American citizen—not holding an office of profit or trust under the United States—from exercising in this country the office of consul of a foreign government.

Our conclusion is that, as it does not appear from the record that the defendant is an alien, and since it is consistent with the record that the defendant was and is a citizen of the same state with the plaintiff, the record, as it now is, does not present a case which the circuit court had authority to determine. Without, therefore, considering the merits of this cause, the judgment must be reversed, and the cause remanded for such further proceedings as may be consistent with this opinion. It is so ordered.

GRAY, J. Mr. Justice Miller and myself concur in the judgment of reversal, on the ground that the circuit court had no jurisdiction of the case, because the record does not show that the defendant was an alien, or a citizen of a different state from that of which the plaintiff was a citizen. We express no opinion upon the question whether, if the record had shown that state of facts, as well as that the defendant was a consul, the circuit court would have had jurisdiction.[1]

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[1] From 4 Sup. Ct. Rep. 407.

BROWN v. LANDON, (1883, U. S.)
30 Hun. 57.
Daniels, Supreme Court of New York.

DANIELS: (Extract) (58) The decedent died in London, in England, where it was alleged in support of the application he left a will making a disposition of his estate. And the applicant for the plaintiff's appointment resulting in the order made by the surrogate was made under the authority of the provisions of the Code, which authorized the issuing of ancillary letters testamentary and of administration. (Code of Civil Procedure, § § 2695, 2696, 2697.) The petition for the letters was in proper form and included the statements required to sustain the application. But the papers produced in support of it were irregular and insufficiently authenticated. For this case the law required an exemplified copy of the will and of the foreign (59) letters issued upon its probate, together with the judgment or decree admitting it to probate. And by section 952 of the Code of Civil Procedure the manner in which these documents were to be authenticated was prescribed by the legislature, but there was a failure to comply with these provisions of the Code. A certificate of the registrar of the probate court was added to what was alleged to be a copy of the will, and to hardly an intelligible statement of the action taken upon the application for its probate. And these certificates were authenticated simply and solely by the certificates of the vice and deputy consul-general of the United States in London, who also certified himself to be a notary public of the United States. But that was not such an authentication of the documents as the statutes upon this subject in very plain language directed should be made to authorize the papers themselves to be read in evidence.

* * * * * * * * *

(60) The power of attorney from the administratrix appointed in the foreign proceedings, and from the son of the decedent, who was nominated as one of his executors, the others having probably declined to act, was also produced in support of the plaintiff's application. This was in like manner proved by the certificate of the same vice-consul. But the acknowledgment of this document could properly be taken before such an officer (2 R. S. [6th Ed.], 1142, § 11); for while he acted in that capacity he was entitled to exercise the authority vested by law in the consul himself. (U. S. R. S., §§ 1695, 1674, sub. 3.)

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Davis, P. J., and Brady, J., concurred.
Judgment affirmed.

BROWN v. THE INDEPENDENCE, (1836, U. S.)
Crabbe 54; Fed. Cases, 2,014.
Hopkinson, District Court.

(Extract) The court do not say that there may not be certain matters in which the official acts of the consul may be proved by his official certificate; but the facts stated in this certificate are not of that character. This is to prove another certificate of the time of Brown's discharge from the hospital; the proceedings of a police court, the sentence of that court, the nature of the wound inflicted on Brown, and the hospital expenses. None of these are official acts of the consul nor did he know one of them of his own knowledge. Had he sworn to them it would have been mere hearsay evidence. He certified to facts and proceedings before another tribunal, with which he had nothing to do, and of which he had no knowledge, official or personal.

I will admit the certificate so far as to show that the libellant was left at Hamburg, without the consul's knowledge or consent, because that is material, but not to prove the rest that it contains.

BROWNE v. PALMER, (1902, U. S.)
92 N. W. 315.
Duffie, Supreme Court of Nebraska.

(Extract) We conclude, therefore, that a United States Consul, duly accredited by the federal government to a foreign power, may, under our statute, take affidavits or depositions for use in our courts.

BRUNENT v. TABER, (1854, U. S.)
1 Sprague 243; Fed. Cases 2,054.
Sprague, District Court.

[Speaks of consul's action in the care of sick and injured seaman left abroad, but seems to raise no question concerning the consul or his action.—ED.]

BUCKER v. KLORKGETER, (1849, U. S.)
Abb. Adm. 402; Fed. Cases 2,083.
Betts, District Court.

(408) (Extract) Cases in which the voyage was broken up or ended in this country, or in which the men were disharged here, have been specified as those in which the courts would most readily enforce the payment of wages due, although, by the strict letter of his contract, the seaman was forbidden to ask their aid. Aertsen v.

The Aurora, Bee's Adm. R. 160. In one respect, indeed, the American courts show a greater favor to seamen in these cases, than do the courts of Great Britain; for the former proceed, irrespective of any interference on behalf of the seaman by his consul or other national representative, whilst the English courts would seem still to insist that the sanction of such an officer to the action shall be procured, unless the nature of the case forbids. The Wilhelm Frederick, 1 Hagg. Adm. R. 138; Edw. Adm. Jur. 128.

I am clear that, notwithstanding a stipulation of this sort, the courts of the United States are open for the protection of foreign seamen, left destitute within their jurisdiction, by improper discharge, or by the breaking up of the voyage for any other cause than the wreck of the vessel.

BURCHARD, THE, (1890, U. S.—Germany)
42 Fed. Rep. 608.
Toulmin, District Court.

[German Consul has jurisdiction by treaty over disputes in which an American member of a crew of a German ship brings a libel for wages on the ground that he is entitled to a discharge. It is for the consul to decide whether he is entitled to be discharged, even though the court may be of a different opinion as to the correctness of his decision.—ED.]

BYERS v. UNITED STATES, (1887, U. S.)
22 Ct. Cl. 60.
Richardson, Court of Claims of United States.

[Power to provide for salary of consul based in congress alone, so an advance in salary made by executive uncollectible.—ED.]

CAIGNET v. PETTIT, (1795, U. S.—France)
2 Dall. 234; 1 L. Ed. 362.
Per Curiam, Supreme Court of Pennsylvania.

A person may cease to be a citizen of one country, without becoming a citizen of another.

This was a *scire facias* against the defendants, as garnishees of Gilbaud, Rogue, and Co., French citizens residing in the West Indies. A rule was obtained by the defendants to show cause why the proceedings should not be quashed, upon the ground, that the plaintiff was also a French citizen, and that, therefore, the court was precluded from exercising any jurisdiction, by the 12th article of the Consular

Convention, which provides, that "all differences and suits between the citizens of France, in the United States, or between the citizens of the United States, within the dominions of France, etc. shall be determined by the respective consuls and vice-consuls, either by a reference to arbitrators, or by a summary judgment and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter; and the appeals from the said consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognizance thereof."

The facts, respecting the plaintiff's citizenship, were briefly these:— He was a native of France, and resided in the island of St. Domingo, at the period of the French revolution. He had afterwards accepted an office from Louis XVI. under the constitution establishing a limited monarchy; but previously to the abolition of monarchy, and the introduction of the republican system (the 10th of Sept., 1792) he came to America, took an oath of allegience to the State of Pennsylvania, under the act of March, 1789 (2 vol. Dall. Edit. p. 676) which act, however, was at the time obsolete,[1] and purchased a tract of land, on which he resided. He had not been naturalized conformably to the act of Congress; but he had frequently been heard to express his abhorrence of the existing constitution of France; he had never done any act showing his assent to it; and he had declared an intention to settle, permanently, in America.

The plaintiff's counsel (Lewis and Levy) made two points—1st. That the 12th article of the Consular Convention applies only to cases where both parties, being French citizens, are actually resident within the United States, and, therefore, does not embrace the case of a foreign attachment.—2d. That the plaintiff never was a citizen of the French Republic; and in support of the latter position they cited the following authorities: Vatt. B. I. ch. 13. s. 161, 167. 2 Vent. 362. 3. 3 Bl. Com. 298. Vatt. B. 3. ch. 18. s. 293, 295. Ibid. B. 1. ch. 19 s. 220, 213. 2 Heinec. 220. Art. of Confed. s. 4. Johnson's Dict. "Citizen." 1 Dall. Rep. 58.

(235) For the defendants, it was urged, by Dallas and Du Ponceau, on the first point, that the Consular Convention extended to all differences and suits between French citizens; that a foreign attachment was, unquestionably, a suit; and that the difference, or suit, existing in the United States, it was not material, either to the words or spirit of the article, that both the parties should be actually resident within the United States. On the 2d. point, it was answered, that the plaintiff necessarily remained a French citizen, till he re-

[1] See Collet v. Collet and The United States v. Vilatto, *post.*

nounced his allegiance, or had done some act incompatible with it; that he was not a citizen of the United States; and unless he was a citizen of France, he exhibited the extraordinary spectacle of a human being who had no country!

BY THE COURT.—Many important topics have been discussed, in the course of this argument; but we do not think it necessary to decide on more than one of them. The sole question is—were both the plaintiff and the original defendants citizens of the French Republic, at the time of instituting this suit? We are clearly of opinion, from the facts disclosed in the affidavits which have been read, that the plaintiff was not then, nor is he now, a citizen of France. It is true, that he has not acquired the rights of citizenship here; nor, as it appears, in any other country; but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution; and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France. Everything that could be said or done to manifest such a determination, has been said and done by the plaintiff, except the act of becoming the subject, or citizen, of another country.

Let the rule be discharged.[1]

CALDWELL v. BARCLAY, et al., (1788, U. S.)
1 Dall. 305 note.
Shippen, Court of Common Pleas of Philadelphia County.

Foreign Attachment.—Moylan obtained a rule to show cause why this attachment should not be quashed, on the ground that one of the defendants, Barclay, being an American consul, and in that character actually residing abroad in the public service, was not within the description of persons, whose effects were made liable to foreign attachment by the act of Assembly.

The rule was opposed by Wilson, Bradford and Sergeant, who contended, that as a consul, Barclay was not entitled, by the law of nations, to any privilege or exemption from legal process; that, even if he was privileged on account

[1] On the subject of the consular jurisdiction, I have been favored with a note of the following decision, taken from the records of the circuit court for the district of Massachusetts, in May term, 1792.

VILLENEUVE *v.* BARRION

It was agreed by the parties to submit this question to the court, to wit:—Whether the convention gave to the French consul cognizance of all differences and suits between Frenchmen; or confined the same to the description of cases therein enumerated, or other cases not arising from transactions in the United States? And, further, that if the court should be of opinion, that the consular jurisdiction extends generally to all differences and suits between Frenchmen, that then the plaintiff shall discontinue the present action without costs.

The court, after hearing the counsel of both sides, on the question proposed, were of opinion, that the consular jurisdiction does not extend generally to all differences and suits between Frenchmen.

The plaintiff, thereupon, prayed leave to discontinue his said action without costs; which being granted, he did discontinue accordingly.

of his official character, he had lost that advantage, by his partnership with the other defendant, who was not entitled to it; and that the act of Assembly makes no difference between persons serving their country abroad, and any other non-residents.

After an able argument, the opinion of the court was delivered by Mr. President Shippen; agreeably to which, the rule was discharged.

CALLON v. WILLIAMS, (1871, U. S.)
2 Low. 1; Fed. Cases 2,324.
Lowell, District Court.

Wages.—On the 19th of July, 1869, the libellant was shipped at Boston as second mate of the ship Puritan, for a voyage to Melbourne and elsewhere, and back to the United States. That voyage ended at San Francisco in March, 1870. The ship arrived at Melbourne about the 5th of November, 1869; and on the 8th of that month, while the vessel was lying at the wharf, some trouble (2) occurred between the first mate and some seamen and their friends from shore, who were drunk and disorderly. The first officer called up the libellant from the hold to assist in restoring order. The libellant took a pistol from his state-room, in order, as he said, to protect himself, and to frighten the men into obedience, and by some accident shot himself in the hand, inflicting a serious wound, which was not fully healed at the time of the trial. A surgeon was sent for, and by his direction the libellant was taken to the hospital. The ship paid the surgeon's bill, and the hospital dues for eleven days, and then the man was discharged from service, and three months' wages were paid into the hands of the consul. The libellant remained in hospital for some weeks longer, and afterwards at Melbourne, until about the 4th of April, 1870, when he was sent home by the consul by way of San Francisco. The master ordered the second mate's clothes to be sent to the consul's office; but the evidence tended to show that they did not come to the actual possession of the man himself. All the extra wages were expended in the care, attendance, and support of the libellant at Melbourne.

C. G. Thomas, for the libellant.

S. Wells, for the respondent.

LOWELL, J. There is some conflict of evidence as to the precise way in which this unfortunate wound was received; but the tendency of the whole testimony is, that it was not incurred wantonly or recklessly, but in the course of what the second officer considered to be his duty. He was summoned hastily to quell what at sea would have been a mutiny, though at the wharf it ought, no doubt, to have a milder name. He says he was violently assaulted by the drunken men, and was knocked down and kicked in the side. The emergency was

sudden, and so serious, that the other man, who was called on to aid the first mate, was frightened and did nothing, and the mate himself was presently obliged to call in the police. Assuming, then, as I do, that the first officer, when he saw the pistol, told the second officer not to use it, and that this was a very proper and humane order, yet I do not find the libellant intending to disobey it. On the contrary, the discharge of the pistol appears to have been accidental. (3).

Under these circumstances, it does not appear very gracious for the owners to strain any doubtful appearances against the only man who stood by the mate, and to insist that he went beyond his duty in their service. He was not enforcing a personal right of his own, nor carrying out any personal quarrel. I cannot hesitate to say that this was an injury incurred in the service of the ship.

Then his general right under the maritime law would be to have his wounds cured at the ship's expense, and to receive his wages during the time of his disability, or, at least, during a reasonable time, not exceeding the length of the remainder of the voyage. Harden v. Gorron, 2 Mason, 541; The George, 1 Sumner, 151; Chandler v. Grieves, 2 H. Bl. 606, n.; The Latonia, Crabbe, 63; The Atlantic, 1 Stuart, Vice Ad. 125. There is no evidence of any stipulation in the shipping articles changing or abridging this right. The contract usual in the whaling service gives the officers and men who are discharged for such a cause only wages *pro rata;* and the validity of such a contract has been recognized by this court in Brunent v. Taber, 1 Sprague, 243, and in other cases. An English statute has lately adopted a similar rule. The ship, under that form of contract, remains liable for the expense of the man's sickness and of his return home; and in Brunent v. Taber it was held, that the seaman having been discharged by the consul by reason of the disability, and without being consulted, the two months' extra wages paid to the consul could not be charged to him, unless he had received them.

In this case there is a question whether the second mate was discharged with his own consent. The consul certifies that he was "duly" discharged; and the master says he told him he should be obliged to discharge him, and should send his extra pay and his clothes to the consul; that he does not remember what answer was given, but that the libellant made no objection, and he supposed he acquiesced. The libellant denies that he ever assented, or, indeed, ever heard any such conversation. It seems probable that some such notice was given in order to satisfy the consul, and I shall assume that the libellant, being notified, did not protest. The statutes authorizing the discharge of seamen, with (4) their own consent, were not intended to apply to a case in which the seaman is confined to his

bed on shore, at the time the vessel is to sail, by a severe injury or illness incurred in the service of the ship. Such a discharge is nothing more than a recognition of the fact that he cannot go to sea. The statute was intended for a case in which there is some choice exercised to go or stay. And there is no consideration for a relinquishment of the seaman's well-established rights, unless, perhaps, where the two months' extra wages would or might be as much as he would otherwise be entitled to . If a fair contract with full understanding should be arrived at, it might be upheld, though the man were more or less ill; but that he should lose the right to be cured, and sent home from Australia, by a mere assent to the necessity of leaving him behind, is not within the true intent of the statute. A district judge of great experience is reported to have held that the consul's certificate of the seaman's consent to be discharged is conclusive evidence thereof: Lamb v. Briard, Abbott, Adm. 367; but as the consul has not so certified in this case, that question does not arise.

The libellant is not to have damages for a wrongful discharge, because it appears to have been entirely fit to leave him in the hospital; but he may have wages to the date of the ship's return to San Francisco, which appears to have been a port of discharge within the meaning of the contract, and the port where the seamen were, in fact, discharged. The precise date of the termination of the voyage was not given in evidence, but it was said to be about the 1st of March. This would give three months and a half at $35; that is, $122.50. Concerning the value of the clothes there is much controversy; and what became of them is not shown; but as no one knows that they ever reached the consul's office, and as the libellant swears he never saw them, he is entitled to recover their fair value. The libellant testifies to an amount of clothing which is shown to be more than men in his position usually take to sea, and more than he seemed to possess, on the testimony of the respondents. But his evidence is, to some extent, corroborated by his boarding-house keeper, and the negative evidence, is not full or precise. Allowing for the depreciation which all such property suffers, it seems just to estimate the (5) loss at $150; which, added to the wages, $122.50, makes $272.50. I have not deducted the extra wages, because they appear to have been consumed in paying the hospital dues, passage-money, and other expenses for which the ship was liable, the case being in this respect like Brunent v. Taber, cited above.

Decree for libellant for $272.50 and costs.

CAMPBELL v. STEAMER UNCLE SAM, (1856, U. S.)
1 McAllister 77; Fed. Cases 2,372.
McAllister, Circuit Court.

(79) (Extract) Such being the conclusion, the court must consider that, released by the breach of the contract by the claimants, the seamen were entitled to their discharge according to the general principles of the law merchant, without the intervention of the consul at Panama. The acts of congress on this (80) subject are cumulative, made for the protection of seamen, and with a view to afford them a prompt remedy; certainly not to withdraw them from the protection of the courts. Whatever has been the action of the consul, or the form of his certificate—whether legal or illegal, regular or irregular—it could not be conclusive upon this court, nor shut its door upon the libelants.

In Hutchinson v. Coombs (Ware, 65), it is laid down that the certificate as to the discharge of a seaman will not preclude the court from inquiring into the cause of his discharge, and awarding damages if his discharge was unjustifiable. Whether the law under which the consul acted be constitutional or not; whether, if constitutional, the conduct of the consul was in strict accordance with it; whether his action was honest, or, as is alleged, covinous, are not the subjects of inquiry.

The question is, "Were the libelants entitled to their discharge?" After the breach of the contract by the claimants, and the detention of the libelants, arising out of that breach, for upwards of a month at Panama, I consider them entitled to such discharge.

It is proper to dispose of two objections urged by the proctor for respondents. It is urged that there is error in the court below in permitting the discharge of libelants at Panama by the certificate of the consul, which is not made evidence by law.

A threefold answer was given: first, it appears by the judge's notes on file that libelants proffered to establish their discharge by parol testimony, that respondents objected to its competency, and, upon their motion, it was ruled out by the court; second, no exception was taken in the court below to the admission as evidence of the consul's certificate; and (81) third, the exhibit "A" annexed to the answer, being the protest of the master, expressly admits the discharge, and only insists on its irregularity.

CAROLINA, THE, see Fry v. Cook.

CASTRO v. De URIARTE, (1883, U. S.—Spain)
16 Fed. Rep. 93.
Brown, District Court.

BROWN, J. This is a motion for a new trial, made by the plaintiff, for alleged error of the court in directing a verdict for the defendant. The action was brought against the defendant, the consul general of Spain, for false imprisonment and malicious prosecution in extradition proceedings, upon the complaint of the defendant, in which the plaintiff was arrested and brought before a commissioner on October 2, 1881, and subsequently discharged for the reason that the offense of forgery for which he was arrested, was committed, as it subsequently appeared, before the ratification of the treaty with Spain. 12 Fed. Rep. 250.

Upon the trial there was no substantial dispute in regard to the facts. The plaintiff was a stranger to the defendant, and the action of the latter was wholly in an official capacity, and under orders from his government. The facts clearly negative any express malice. The plaintiff himself, in his testimony, stated that he did not believe there was any malice on the part of the defendant.

The court ruled (1) that the warrant was sufficient on its face to authorize the arrest of the accused; (2) that, upon the undisputed facts, the defendant had probable cause for the proceedings, and was not chargeable with malice, and, on that ground, directed a verdict. Exceptions were duly taken to both of these rulings, upon which the motion for a new trial is now made.

1. It is contended that the warrant under which the plaintiff was arrested was void, because it did not show "what act or instrument the plaintiff was charged with forging or falsifying." Article 2 of (95) the convention with Spain, January 5, 1877, provides that "persons shall be delivered up who shall have been charged with or convicted of any of the following crimes:" "Subdivision 9, forgery or the utterance of forged papers;" subdivision 10, "the forgery or falsification of the official acts of the government or public authority, including courts of justice, or the uttering or fraudulent use of any of the same." The warrant in this case recited that the plaintiff had been charged "with having, in the kingdom of Spain and in its jurisdiction, to-wit, at Havana, Island of Cuba, on or about the twenty-fifth day of September, 1881, committed the crime of forgery by forging an official document, or falsification of the official acts of the government of Spain, or public authority."

In the case of Macdonnell, 11 Blatchf. 79, 88, the circuit judge says:

"The description of the offense might, in my opinion, for all purposes of

insertion in the warrant of arrest, have followed the words of the treaty. * * * This is all that is essential to jurisdiction of the subject-matter. It is not necessary that the particulars required to be proved in order to establish the offense mentioned in the treaty should be specified in the warrant. * * * The warrant, reciting other jurisdictional facts, declares that on complaint to the officer 'forgery' is charged, etc. If there were no other detail or specification, I should hold that, for all the purposes of the warrant of arrest, this was sufficient."

At common law it was not necessary to recite the accusation in the warrant. Under the Revised Statutes of New York, vol. 2, p. *706, § 3, and Code Crim. Proc. § § 151, 152, the warrant must state the accusation, offense, or crime; but it is sufficient to state it by its statutory designation without further particulars. Payne v. Barnes, 5 Barb. 465; Atchinson v. Spencer, 9 Wend. 62; People v. Donohue, 84 N. Y. 438. The description of the offense in this warrant conforms to the requirements of the treaty and to the practice in the state of New York, and such a warrant cannot, upon the above authorities, be held void upon its face. See, to the same effect, the very interesting, late case of Terraz, 4 Exch. Div. 63.

2. It is further contended that the warrant of arrest was void both because no preliminary mandate had been obtained from the executive authorizing the extradition proceedings, and because the warrant did not set forth any such preliminary mandate.

In the case of Farez, 7 Blatchf. 34, 46, it is said that where such a preliminary mandate "is made a prerequisite by the treaty," it should be set forth upon the face of the warrant. In my opinion this treaty does not make such a warrant a prerequisite.

(96) In the earlier cases in this district it was held, following the opinion of Nelson, J., in *Ex parte Kaine,* 3 Blatchf. 1, that a preliminary mandate from the executive was in all cases necessary to authorize a commissioner to entertain the proceedings, whether the treaty contained any reference to such a preliminary mandate or not. This was questioned by Woodruff, C. J., in the case of Macdonnell, 11 Blatchf. 79, 83; and in the case of Herman Thomas, 12 Blatchf. 370, 379, the circuit and district judges in this district concurred that no such preliminary mandate was necessary, "except where made so by the treaty." In that case the proceedings were instituted under the treaty with Bavaria, which like the treaty with Great Britain, makes no allusion to any preliminary mandate of the executive. See, also, in re Kelley, 2 Low. 339.

Article 11 of the convention with Spain declares that "requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties," or, in their absence, by its "superior consular officers." It next provides, that—

"It shall be competent for such representatives or such superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, whereupon the judges and magistrates of the two governments shall, respectively, have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate, that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive."

The "requisition for surrender" above provided for is manifestly the application for the final warrant for the surrender of the fugitive, which can only be executed by the executive authority, after the judicial examination. That requisition is wholly different from the "mandate or preliminary warrant of arrest," which it is also "competent to ask, and obtain," at the outset; and while it is thus competent to ask for such a preliminary warrant, the language of this section of the treaty is plainly permissive, and not necessarily obligatory, if other means are provided by law for obtaining a judicial investigation, preliminary to final surrender. Such means are plainly provided by section 5270 of the Revised Statutes, embodying the act of August 12, 1848, (9 St. at Large, 302.) This section provides that—

"Whenever there is a treaty or convention for extradition," etc., "any justice, commissioner," etc., "may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory with (97) having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge * * * he shall certify the same to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention, and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The treaty with Spain was made on January 5, 1877, subsequent to the Revised Statutes; but section 5270 is evidently intended to apply to treaties that might thereafter be made, as well as to treaties then existing. It was so held in the case of Van Hoven, 4 Dill. 411, 414; and the act of August 12, 1848, which was substantially the same as section 5270, expressly declared that these provisions are to be applied "in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition."

Treaties duly ratified under the constitution (article 6) are doubtless a part of the supreme law of the land, and their stipulations and obligations will not be deemed annulled by acts of mere general legislation which can be reasonably construed otherwise. The Cherokee Tobacco, 11 Wall, 616, 623; Taylor v. Morton, 2 Curt. 454; Ropes v. Clinch, 8 Blatchf. 304, 309. But the mere fact that a treaty provides a mode of carrying out its provisions, in the absence of legislation, cannot make it incompetent for congress to pass laws in aid of the treaty, and, in order to faciliate the extradition of criminals, to dispense with a part of those preliminaries which otherwise it might be necessary for the foreign government to resort to. The procedure indicated by section 5270, above quoted, is in substance identical with that contemplated by the treaty with Spain, except that it dispenses with any preliminary executive warrant. Had there been no law of congress upon the subject, such an executive warrant would have been necessary in order to authorize the magistrates to proceed; but, inasmuch as the law of this country expressly authorizes the magistrates to proceed, "whenever there is a treaty or convention for extradition," without reference to any preliminary executive warrant, such a warrant seems to me clearly unnecessary, if the demanding government chooses to avail itself of the law existing outside of the treaty, and proceed without the preliminary mandate.

(98) This construction of the treaty has been adopted by the executive department. In an official letter from Mr. Frelinghuysen, secretary of state, to the Spanish minister, bearing date May 23, 1862, after referring to section 5270, Rev. St., above quoted, it is said:

"This provision of the statutes of the United States is deemed by this government to be in aid of the provisions of the convention; and the provisions of article 11 of the convention are held to be directory only. Under these circumstances the warrant of authorization from the secretary of state is not considered as indispensable. It may often happen that an instant arrest is expedient in order to secure the accused fugitive for examination into his criminality; and in such emergencies the delay incident to procuring the warrant of authorization from this department might defeat the purposes of justice. The personal rights, moreover, of the accused are secured by the provisions of the convention, no less than by those of the statute, inasmuch as he can only be surrendered on satisfactory evidence of his criminality."

While the construction which may be placed by the executive department upon laws or treaties is not necessarily binding upon the judiciary, yet where its construction is not repugnant either to their letter or obivious intent, and, as in this case, is sustained by such manifest considerations of convenience and expediency, it should be adopted without hesitation. This construction is not repugnant to the

language of this treaty. The preliminary warrant is permissive only. It is not made obligatory. It is not, in the language of this court in the case of Farez, "made a prerequisite by the treaty." Congress might have provided by law, in the absence of any treaty, for an examination of offenders charged with committing crimes in foreign countries, and for their surrender if satisfactory evidence of guilt appeared. A person arrested under such a law could not be heard to complain that there was no treaty requiring his surrender, or, if the statute were followed, that his arrest was illegal. Congress has, in fact, provided that "whenever there is a treaty or convention for extradition," certain proceedings may be had. And this law is without regard to the particular provisions of the various treaties, and requires no previous executive mandate. The proceeding in this case was in strict accordance with this law of congress; and a proceeding which in all respects follows that law and all its conditions cannot be void so as to serve as the basis of an action for false imprisonment. Nor can it be said that this construction would make wholly useless the terms of a treaty allowing an application for a preliminary mandate. In the first place there may be no general law of Spain providing for any course of procedure outside of the treaty stipulations; and as this convention relates to both countries alike, (99) it may have been necessary then, and may be still, in all cases of applications by our government for the surrender of criminals by Spain, to obtain such a preliminary warrant, in order to authorize the magistrates of that country to proceed with a judicial investigation. Or, again, cases may arise of such a political character that it may be expedient and desirable that the demanding government, upon presentation of the facts, should obtain from the executive an immediate consideration and decision of the question involved in the surrender claimed, without the delay or publicity incident to a previous judicial examination; and in such a case it is still at the option of the demanding government to require a preliminary warrant and thus obtain the ruling of the executive at once.

In effect, under our law, two proceedings are available to the demanding government;—one, according to the provisions of the treaty alone; and the other under the Revised Statutes as well; and so long as the provisions of neither are repugnant to the other, as in this case they are not, it is at the option of the demanding government to pursue either. But even if it were held that to authorize the final surrender of the accused all the provisions of the treaty should be literally followed, I do not see how, in an action for false imprisonment, the proceeding on the warrant of arrest can be held void, when it is expressly authorized by a valid law of congress, and exactly fol-

lows the provisions of the statute. This objection, therefore, should be overruled.

3. It is further urged that the court erred in not submitting to the jury the question of probable cause, on the part of the defendant, in instituting the proceedings before the commissioner.

On the twenty-ninth of September the defendant, as consul general, received from the Spanish minister an order to procure the arrest of the plaintiff in extradition proceedings, who, it appeared from the telegram from Havana on that day, had sailed from Cuba for New York on the 27th. The consul thereupon applied to the commissioner, and was told that more definite and specific charges were necessary. Being directed by the Spanish minister to communicate directly with the captain general of Cuba, the defendant telegraphed for the particulars of the offense.

On the second of October the defendant received in reply a further telegram, stating that the crime of Castro was obtaining moneys under false pretense, deceit, imposition, and falsification of public documents. In the meantime Castro had arrived, had been traced to Sixteenth street in this city, and it was feared would depart to (100) Canada. The information by telegram was sufficient except in fixing the date of offense.

The treaty provided that it should not apply to any offense committed before its date, that is, 1877. In this exigency, the defendant being informed by the commissioner that the precise date of the offense was immaterial, provided that it were within the period of the treaty, it was considered under the telegram for extradition that the offense was undoubtedly committed within the treaty period, and probably about the time of his escape; and the complaint was accordingly written out upon information and belief, stating that the time of the offense was on or about September 25, 1881.

Upon the warrant issued upon this complaint the plaintiff was arrested and brought before the commissioner the following morning, allowed to go on his own parol upon his statement that the offense alleged was prior to the treaty, and this being verified by telegrams in answer to further inquiries, he was upon the following day discharged.

Upon these facts there was no dispute, nor was it claimed that the consul general was actuated by any motives other than the proper performance of an official duty, under the orders received, to procure the extradition of the plaintiff. It appeared upon the trial that the plaintiff had been recently indicted upon this charge of forgery, which had only been discovered in 1880; that he had given bail for his appearance before the proper magistrate in Havana,

which he had forfeited by his departure to this country. Under the orders which the consul general had received from the Spanish minister, it was his duty, under heavy penalties to his own government, to act with diligence.

The only questions on this branch of the case were whether the defendant was legally chargeable with malice, and whether, under the circumstances, he had provable cause for charging the offense within the treaty period. To sustain the court for malicious prosecuting, both malice and the want of probable cause must so exist. It seemed to me at the trial, and it seems to me still, that under the undisputed facts there is but one possible answer to both questions, and that is that there was no malice, and that the defendant was warranted in assuming, and was bound to assume, under the circumstances, where immediate action on his part was demanded, that the offense for which he was required to procure extradition was committed within the period of the treaty; that under such instructions and such telegrams, not only was this probable, but the contrary was (101) highly improbable; and that had he suffered the accused to escape through a failure to proceed upon the possible but improbable contingency that the date of the offense was prior to the treaty, he would have been justly subject to the charge of negligence of official duty had the crime been committed within the treaty period. As that was the only reasonable inference under the circumstances, the complaint was not without probable cause, as it was also without malice.

In the case of Stewart v. Sonneborn, 98 U. S. 187, the court quote with approval the language used in Sutton v. Johnstone, 1 Term R. 493: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." And, say the court: "This is the doctrine generally adopted. It is therefore, generally, the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not." See, also, Heyne v. Blair, 62 N. Y. 19.

On this branch of the case there were no facts in dispute, nor, as it seems to me, any rational doubt in regard to the inference to be drawn from them, namely, that there was no malice nor want of probable cause in the proceeding of the defendant; and it was, therefore, the duty of the court to direct a verdict in his favor. Commissioners v. Clark, 94 U. S. 278, 284.

The motion for a new trial should be denied, with costs.

CATLETT v. PACIFIC INS. CO., (1826, U. S.)
1 Paine. 594; Fed. Cases 2,517.
Thompson, Circuit Court.

(Extract) These proceedings purported to be under the seal of the court, certified by the register, and accompanied by a certificate of the American consul, under his seal of office, that he was such register.—I attach no credit to the consular certificate. It has been said that he is an officer recognized by the law of nations, and entitled to credit. The law of nations recognizes him only in commercial transactions, but not as clothed with any authority to authenticate judicial proceedings.

(LAS) CAYGAS v. LARIONDA'S SYNDIC, (1816, U. S.)
4 Martins Reports Louisiana 283.
Mathews, Supreme Court of Louisiana.

(Extract) As the instrument [a power of attorney, purporting to have been executed before a notary public] offered in evidence is clearly not one of those which could receive authenticity by the certificate of one of the agents of our government.

CHARLOTTE, THE, (1804, Great Britain—Russia)
5 Rob. C. 313.
Sir William Scott, High Court of Admiralty.

(Extract) It is said that the claimant in that instance was the Swedish consul in Russia; but that circumstance could have made no difference, since it must have been familiar to all who had to judge of that case, that his character of consul to a foreign nation could not vary the principle that was to be applied to it. As a person resident in Russia, he could be considered in no other light than other merchants of the country.

CHESTER v. BENNER, (1871, U. S.)
2 Low. 76; Fed. Cases 2,660.
Lowell, District Court.

(Extract) That case (Jordan v. Williams, 1 Curtis C. C. 69) virtually decides, that, in suits between the crew and the master or owners, such an imprisonment by order of a consul must be presumed to have been necessary, and, it seems to follow and is intimated by the court, that the necessary charges resulting from that course must fall upon the seaman, as between them and the owners, though they have a right of redress against the consul. In a case like this, in which

no single sum in dispute is large enough to admit of an appeal, I must follow that decision of the circuit court, though I venture to think its reasoning unsound.

CHURCH v. HUBBART, (1804, U. S.)
2 Cranch 187, 237.
Marshall, Supreme Court.

(232) March 5th. MARSHALL, Ch. J., delivered the opinion of the court.

If, in this case, the court had been of the opinion that the circuit court had erred in its construction of the policies, which constitute the ground of action; that is, if we had conceived that the defence set up would have been insufficient, admitting it to have been clearly made out in point of fact, we could have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the policies. If the proof is sufficient to show that the loss of the vessel and cargo was occassioned by attempting an illicit trade with the Portuguese; that an offense was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "The insurers are not liable for seizure by the Portuguese for illicit trade."

In the second policy the words are, "The insurers do not take the risk of illicit trade with the Portuguese."

The counsel on both sides insist that these words ought to receive the same construction, and that each exception is substantially the same.

The court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived for supposing any intention in the contracting parties to vary the risk.

For the plaintiff it is contended, that the terms used require an actual traffic between the vessel and inhabitants, (233) and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by

common usuage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the Crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with these colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." They do not take the risk of illicit trade with the Portuguese." Now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation (234) after the very act had been committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. If the danger did not commence till the vessel was in port, or till the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law. But as a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a

condition to trade, and to be afterwards governed in their proceedings with respect to those vessels by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally (235) admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really

necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *guarda costas* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. Indeed, the (236) right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American government, no such principle as that contended for has a real existence.

Nothing, then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the Aurora, by the Portuguese governor, was an act of lawless violence.

The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese," is an exclusion only of that risk, to which such trade is by law exposed, will be readily conceded.

It is unquestionably limited and restrained by the terms "illicit trade." No seizure, not justifiable under the laws and regulations established by the Crown of Portugal, for the restriction of foreign commerce with its dependencies, can come within this part of the contract, and every seizure which is justifiable by those laws and regulations must be deemed within it.

To prove that the Aurora and her cargo was sequested at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury.

The edicts of the Crown are certified by the American consul at Libson to be copies from the original law of the realm, and this certificate is granted under his official seal.

Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court

of justice. The principle (237) that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony attainable, by the party who offers it, applies to foreign laws as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

In this case the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit.

Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenicating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated that to require respecting laws or other transactions, in foreign countries that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation would be rejected, unless the fact should appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy. Indeed, in this very case the very testimony offered would contradict such a presumption. The paper offered to the (238) court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate.

It is asked in what manner this oath should itself have been authenticated, and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad,

and the commissioners have authority to administer oaths, and to certify the depositions by them taken.

The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

The paper offered as a true copy from the original proceedings against the Aurora, is certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of state for foreign affairs, and the consul certifies the English copy which accompanies it to be a true translation of the Portugese original.

Foreign judgments are authenticated,

1. By an exemplification under the great seal.
2. By a copy proved to be a true copy.
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained an admissible substitute for either of them.

If it be true that the decrees of the colonies are transmitted (239) to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence of the verity of what was so certified; but the certificate offered to the court is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her carge in Para ought not to have been laid before the jury.

Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read on the certificate of the consul. Interpreters are always sworn, and the translation of a consul not on oath can have no greater validity than that of any other respectable man.

If the court erred in admitting as testimony papers which ought not have been received, the judgment is of course to be reversed and a new trial awarded. It is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that

effect might be given. If this was even true in point of act, the inference is not correctly drawn. There must be a new trial, and at the new trial each party is at liberty to produce new evidence. Of consequence this court can give no instructions respecting that evidence.

The judgment must be reversed with costs, and the cause remanded to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go to the jury, unless they be authenticated according to law.[1]

Cited 4 Cranch. 72; 8 Pet. 517, 518; Id. 523; 13 Pet. 218; 14 How. 427; 1 Bald. 91; 1 Gall. 63; 3 Mason 20; 2 Sum. 359; 1 Wood. & M. 488; 2 Wash. 120.

CLARKE v. **CRETICO,** (1808, Great Britain)
1 Taunton 105.
Sir James Mansfield, Court of Common Pleas.

The defendant, who was stated to be consul general of the Sublime Porte, in London, being in custody under an arrest, a rule nisi was obtained in the last term for his discharge.

Bayley, Serjt. in the same term, showed cause against the rule. He contended, 1st. That in fact, the appointment of the defendant had been expressly revoked; 2dly. That the privilege from arrest did not extend to the office of consul. It is not conferred by any statute: the act of 7 Ann. c. 12., speaks only of "ambassadors or other public ministers." But a consul is not a public minister. Vattel, b. 2. c. 2. s. 34. It is no part of his office to transact business between the two states. The principal objects of his appointment are to decide controversies among persons of his own nation, and to give them from time to time such advice and information as may be necessary for the direction of their conduct, and for the regulation of their commercial concerns. In Barbuit's case, Cases temp. Talb. 281., although there was no decision upon this point, yet the opinion of Lord Talbot was against the privilege. To extend the exemption to persons in this situation would be attended with much inconvenience; because they are generally engaged in trade, and are frequently subjects of the country in which their office is exercised.

[1] In the argument of this case, a question was suggested by Chase, J. whether a bill of exceptions would lay to a charge given by the judge to the jury, unless it be upon a point on which the opinion of the court was prayed; and doubted whether it would within the statute of Westminster.

MARSHALL, C. J., thought it would, and observed that in England the correctness of the instruction of the judge to the jury at *nisi prius*, usually came before the court on a motion for a new trial, and if in this country the question could not come up by a bill of exceptions, the party would be without remedy.

Neither, according to the best authorities, is the person of a consul privileged from arrest by the law of nations. Wicquefort, in his treatis entitled the ambassador, b. 1. s. 5., observes, "that consuls are only merchants, who notwithstanding their office of judge in the controversies that may arise between those of their own nation, carry on at the same time their own traffic, and are liable to the justice of the place where they reside, as well in criminal as civil matters; which is altogether inconsistent with the quality of public minister." But, 3dly. This appointment being derived from the late Sultan Selim, is determined by the deposition of that monarch. Several months have elapsed since that event; the defendant has continued to reside in this country, and if the privilege, provided it ever existed, be held still to continue, no period can be assigned for its termination.

Best, Serjt. contra, denied that the defendant's appointment had been revoked. 2dly. As to the general question whether a consul was privileged from arrest, he observed, that in the case of Triquet v. Bath, 3 Burr. 1481. Lord Mansfield recognizes and confirms the doctorine laid down in Barbuit's case by Lord Talbot, who "declared his clear opinion that the law of nations in its full extent was part of the law of England." It would be sufficient, therefore, to show that by the law of nations, a consul is entitled to this privilege, without inquiring whether he is in the strict sense of the words a public minister. Vattel, b. 2. c. 2. s. 34. in treating the subject, observes, "that the sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be nugatory and delusive. His functions require that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the law of nations by some enormous crime." With respect to the opinion of Wicquefort, he has also shown (Ib.) that the instances to which that writer refers contradict the position which they are cited to establish. It is admitted that in Barbuit's case there was no decision against the claim; and the reporter mentions in a note, that "the person was afterwards discharged by the secretary's office satisfying the creditors," so strong was the opinion in favor of the privilege. Though it sometimes happens that a consul is a native of the country in which his office is exercised, the government, if it thinks proper, may refuse to admit a subject to act in that character:—the supposed inconvenience arising from this circumstance may therefore be easily obviated. As to the third point, he denied that the defendant's privilege was affected by the

deposition of his sovereign. "A minister, notwithstanding the death of his master, still continues to be the minister of the nation, and as such, is entitled to enjoy all the rights and honors annexed to that character." Vattel, b. 4. c. 9. s. 126. It is his duty to remain in the country to which he has been sent, until the pleasure of his new sovereign be known. "If he be recalled or dismissed, though his functions cease, his rights and privileges do not immediately expire; he retains them till his return to his soverign, to whom he is to make a report of his mission." Ib. s. 125.

Mansfield, Ch. J. It has not been clearly proved that the defendant held the office of consul at the time of the arrest. The general question is undoubtedly of importance; but it is not necessary that the court should come to any determination upon it at present. The office of consul is indeed widely different from that of an ambassador; but still the duties of it cannot be performed by a person in prison. Yet I should have some difficulty in deciding in opposition to Wicquefort, who is an authority of great weight, and without any determination upon the question, (for in the case before Lord Talbot there was no decision,) that a consul is entitled to that privilege. The words of the statute are "ambassador or other public minister." but a consul is certainly not a public minister. Let the case stand over till it shall be ascertained by further evidence, whether the appointment of the defendant has been revoked.

Bayley having now produced an affidavit by which it appeared that the defendant had been dismissed from his office in the month of December, 1806.

The rule was discharged.

COFFIN v. WELD, (1871, U. S.)
2 Low. 81; Fed. Cases 2,953.
Lowell, District Court.

(Extract) And as a general rule, the right to wages after a discharge, which is not made at the request of the mariner, may be supported or contested on its merits, notwithstanding the action of the consul. The consul has jurisdiction, as will presently appear, to inquire into cruel treatment of the crew by the master and officers; and if the consul in this case had decided that there had been no cruelty, his finding might be conclusive: I know of no authority that the consul has to discharge a seaman for disobedience. I do not mean that he may not and ought not to advise the master or that the latter may not discharge a man for wilful and obstinate refusal of duty; but that in a suit for wages, the ultimate responsibility rests on the master and that the advice of the consul is only evidence, and

not a judicial and conclusive finding, that the man ought to be discharged: U. S. v. Lunt. 18 Law Reporter 683. The consul at Singapore took the right course, and discharged the men for cruel treatment by the mate, and noted the cause of discharge upon the articles though they had not deserted.

COHENS v. VIRGINIA, (1821, U. S.)
6 Wheat. 264.
Marshall, Supreme Court.

(Extract) It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction."

This distinction between original and appelate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the supreme court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate (393) form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything, the

character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class (394) those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the supreme court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the supreme court, in such a manner as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending that the legislature may "apportion the judicial power between the supreme and inferior courts according to its will." That would be, as was said by this court in the case of Marbury v. Madison, to render the distributive clause "mere supplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

(395) But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed:" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a state is a party,

the supreme court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the supreme court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the (396) supreme court, but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another state in a circuit court? Should the circuit court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the supreme court? The argument is, that it could not; and the very clause which is urged to prove that the circuit court could give no judgment in the case, is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original, "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive (397) by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister,

could it be contended that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert in our prize courts the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most (398) clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be (399) instituted in a federal court. Of the last description, is every case between a state and its citizens and perhaps,

every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.[1]

COLEBROOK v. JONES, (1751, Great Britain)
Dickens 154.
Hardwicke, Chancery.

The plaintiff was consul abroad: the defendant applied, that he might give security to answer costs, according to the course of the court. Lord Hardwicke c. said, he must consider the plaintiff as a land or sea officer in the service of his Majesty, and therefore would not grant it.[2]

COMMONWEALTH v. DI SILVESTRO, (1906, U. S.—Italy)
31 Pa. Super. Ct. 537.
Orlady, Superior Court of Pennsylvania.

(553) (Extract) Though some abuses were alleged relating to fees to be charged in conducting the affairs of the office of consul, they relate to possible rights of persons having business relations with a foreign official and in regard to which none of our citizens could be concerned. Nor would our public be interested in the expending of the moneys furnished by the Italian government to its consul for its home military purposes. The redress for such grievances would be affected through channels over which our laws would not have any control.

COMMONWEALTH v. KOSLOFF, (1816, U. S.—Russia)
5 S. & R. 545.
Tilghman, Court of City of Philadelphia.

[1] [The above is but a short extract from the opinion, the whole of which is most important for understanding the jurisdiction of the federal courts over consuls.—Ed.]

[2] [This is all the reports contain about this case.—Ed.]

It seems, a consul-general is not protected, by the law of nations, from a prosecution and indictment for a rape.

But the state courts have no jurisdiction in such case: exclusive jurisdiction is vested in the courts of the United States. (a)

TILGHMAN, C. J. The grand inquest for the city and county of Philadelphia having preferred a bill of indictment for a rape, against Nicholas Kosloff, consul general of his Imperial Majesty the Emperor of Russia, a motion has been made to quash that indictment for want of jurisdiction in this court. Two causes are assigned for our want of jurisdiction. 1. That the privilege of immunity from criminal prosecutions is conferred on consuls by the law of nations. 2. That by the Constitution and Laws of the United States, exclusive jurisdiction in all cases affecting consuls, is vested in the courts of the United States.

1. It is granted, that by the modern law of nations, ambassadors and other public ministers are, in general, exempt from criminal prosecutions. Perhaps, there are some offenses, such as an attempt on the life of the sovereign with whom they reside, which would warrant their punishment. But in everything short of an extreme case, it is more conducive to the peace, and more agreeable to the usage of nations, to send them to their own sovereign, to receive from him the punishment they deserve. It has not been contended, that a consul is a public minister; but it is said, that a consul-general, such as Mr. Kosloff, is prohibited from exercising trade and commerce, and entrusted with important concerns from his sovereign, and so nearly resembles a public minister, that he is entitled to some of his prerogatives, and in particular, to exemption from criminal prosecution. In (546) considering this case, we must exclude from our view, the august personage to whom allusion was made in the argument. Considering his high character, and the intimacy of the relations to be preserved with him, there is but one voice—one wish. These considerations would have their deserved weight in the proper place. But before us there is only a naked question of right, in which all nations are equally concerned; for we cannot but see, that that which is granted as the right of one, must be conceded as the right of all.

The law of nations is sought for in the usages of nations; in the opinions of approved authors; in treaties; and in the decisions of judges. With regard to the privileges of consuls, there is some difference of opinion, among respectable authors. Wicquefort, Bynkershoek and Martens allow to a consul no privilege against suits civil or criminal; and the reason they assign is, that consuls in no

(a) See Davis v. Packard, 7 Pet. 276; Sagory v. Wissman, 2 Ben. 240.

manner represent the person of their sovereign, but are sent for the purpose of assisting his subjects, particularly in matters of commerce, and sometimes of deciding disputes which may arise between them, by permission of the government in whose dominions they reside. (See Wicquef. *L' Ambassadeur,* Book 1, p. 65. Bynk. *de foro legatorum,* chap. 10, p. 113, Barbeyrac's translation into French. Marten's summary of the law of nations, book iv. chap. 3. sect. 8.) Opposed to them, is Vattel, who, although he does not assert, that a consul is entitled to the privileges of a public minister in general, is yet of opinion, that from the nature of his functions, "he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violates to the law of nations by some uncommon crime. Vatt. book ii., chap. 2, sect. 34. I am not quite sure what is meant by *violating the law of nations,* in this passage. Crimes against the law of nations, are sometimes understood to be, crimes which all nations agree to punish. Such are murder and rape, among the civilized nations: and if that be the meaning of Vattel, his authority would not exempt the consul from the present prosecution.

But what is of more weight than the judgment of authors, however respectable, is the opinion and the practice of our own government, and that of the foreign nations with whom we have had intercourse. We have had treaties with France, Spain, Great Britain, Holland, Prussia and **(547)** Sweden, in all of which the subject of consuls has been introduced, and in not one of which have consuls been protected from suits civil or criminal, I say nothing of our treaties with the Barbary powers, because there are special reasons why all nations who send consuls to them, take care to provide expressly for their personal security. In the treaty with Great Britain, made in 1794, consuls are expressly declared to be subject to punishment by the law of the country in which they reside. By the consular convention with France, in 1788, there is to be full and perfect immunity, concerning the chancery and its papers, but the house of the consul is to be no asylum for persons or effects. And in our other treaties, the most that is stipulated in favor of consuls is, that they shall respectively enjoy the same prerogatives and favors, that are granted to those of the most favored nations. These treaties afford a strong proof of the usage of nations—for it cannot be supposed, that they should have omitted to secure consuls from criminal prosecutions, if it had been thought desirable, or usual, to afford them that protection.

But there is not wanting more direct proof of the opinion of our own government. In the "act for the punishment of certain crimes

against the United States," passed April 30, 1790, penalties are inflicted on persons who sue out process from any court, against an ambassador or other public minister—but the act is silent as to consuls. And what is direct to the point, the 9th sect. of the "act to establish the judicial courts of the United States" (passed September 24, 1789) vests the district courts with jurisdiction of offenses committed by consuls, in which the punishment does not exceed a fine of 100 dollars, etc. Neither are we left, on this important subject, without the light of judicial decision. Mr. Ravara, consul from Genoa, was indicted and convicted for a misdemeanor, in the circuit court of the United States. 2 Dall. 299. He was defended by able counsel, who contended for his privilege, on the authority of Vattel. But the court decided against him, and it is worthy of remark, that Ch. J. Jay presided, who had been long employed in a diplomatic function of a high grade at the court of Madrid, and was one of the ministers of the United States who negotiated the treaty which established our independence, at Paris. No person, certainly, had better opportunities of knowing the usage of nations, or a (548) better capacity for improving these opportunities. From all these considerations, I cannot hesitate in the opinion, that there is nothing in the law of nations, which protects the consul-general of Russia from this indictment.

2. A more difficult question remains to be considered: Is the jurisdiction of this court taken away by the constitution and laws of the United States? Before I go into an examination of the constitution and laws, it may not be improper to say a word or two respecting the subject in which this question arises. An agent of a foreign government, accused of a crime committed in the state of Pennsylvania, claims, not an exemption from trial, but the right of being tried by a court of the United States. His public relations are, not with the state of Pennsylvania, but with the government of the United States: and if the emperor of Russia should suppose that he had cause to complain of our treatment of his officer, he must address himself, not to the governor of Pennsylvania, but to the president of the United States. But even where there was a cause of complaint, cases may be easily supposed, in which the president might think it more conducive to the peace of the nation, to send a foreign agent out of the country, to be punished by his own sovereign, than to inflict punishment on him, by our own laws, here.

These considerations are so manifest, that when the people of the United States were about to form a federal government, through which alone they were to maintain an intercourse with foreign nations, it would have seemed a want of common prudence, not to com-

mit to that government the management of all affairs respecting the public agents of those nations. Let us now advert to the instrument of our Federal Union, and we shall soon perceive, that the statesmen who framed it were perfectly aware of the importance of placing all public foreign agents, consuls included, under the complete superintendence of the federal government. It was through the judicial power that those persons could principally be affected. Accordingly, we find it provided by the 2d sect. of the 3d article of the constitution, that the judicial power shall extend "to all cases affecting ambassadors, other public ministers and consuls." Words more comprehensive cannot be devised. They include suits of every kind, civil and criminal. This is not denied by the attorney-general of Pennsylvania, nor, as I (549) understand, is it denied, that by virtue of this provision, congress had a right to declare by law, that in no case, civil or criminal, should a state court have jurisdiction over a consul. But it is contended, that until congress does by law declare so, the state courts have concurrent jurisdiction with the courts of the United States; or rather, that in the case before us, the state courts alone have jurisdiction, because, congress having passed no law defining the crime or the punishment of rape, the courts of the United States cannot take cognisance of the offense.

The constitution, in the 1st section of the 3d article, declares in what courts the judicial power shall be vested, viz: "in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." In the 2d section, it enumerates the different cases to which the judicial power shall extend, and then goes on to direct the distribution of that power among the different courts. "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction: in all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such restrictions as the congress shall make." Thus the judicial power, extending to all cases affecting consuls, and that portion of it which respects consuls, being vested in the supreme court, it follows, that as soon as the supreme court was organized by law, it became immediately vested with original jurisdiction in every case by which a consul might be affected. But was this an exclusive jurisdiction? The opinion of the supreme court, Marbury v. Madison, 1 Cranch 137, goes far towards establishing the principle of exclusive jurisdiction. The point decided in that case, was, that where the constitution had vested the supreme court with appellate jurisdiction, it was not in the power of congress to give it original jurisdiction; and the whole

scope of the argument maintained in the court's opinion goes to prove, that where the constitution had given original jurisdiction, it was not in the power of congress to give appellate jurisdiction. This will appear from the following extract from that opinion. "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original, the (550) distribution of jurisdiction made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed, and in this case, a negative or exclusive sense must be given them, or they have no operation at all."

"If the solicitude of the Convention, with respect to our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the power of congress had been intended. That they should have appelate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction, unless the words be deemed exclusive of original jurisdiction." Now taking this to be the construction of the constitution, all these parts of the "act to establish the judicial courts of the United States," which vest jurisdiction in cases affecting consuls, in the district or circuit courts, would be unconstitutional and void. And, if it was intended by the constitution, that no inferior court of the United States should have jurisdiction, it cannot be supposed that a state court was to have it, because there is much stronger reason for denying it to the state courts, than to the inferior courts of the United States.

It will be perceived, that this principle shakes the decision in the case of Ravara, who was convicted in the circuit court, though not that part of the decision which respects the privilege of a consul. But if the two cases cannot be reconciled, the circuit courts must give way. Supposing however, for argument's sake, that the constitution does not vest the supreme court with exclusive jurisdiction; let us see whether congress has not excluded the state courts by the judiciary act passed 24th September, 1789. By the 9th section, the district courts are vested, exclusively of the courts of the several states, with the cognizance of "all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding 100 dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Consuls are embraced in this jurisdiction, as plainly appears by consid-

ering the whole section, and as was declared by this court, in Mannhardt v. Soderstrom (1 Binn. (551) 138). Then comes the 11th section, by which the circuit courts are vested with exclusive cognizance of "all crimes and offenses cognizable under the authority of the United States, except where the said act otherwise provides, or the laws of the United states shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offenses cognizable therein." Does not this exclude the state courts from jurisdiction in the case of consuls? The only argument attempted, or that can be devised, in support of the negative, is, that no offense is cognizable in any court of the United States, until congress has declared it to be an offense, and prescribed the punishment. This is the only consideration which ever had the least weight in my mind. But upon mature reflection, I am unable to deny, that the courts of the United States can take cognizance, when I find it written in the constitution, that the supreme court shall have jurisdiction in all cases affecting a consul. Is he not affected in criminal cases, much more than in civil? How then can I say, that the supreme court has no jurisdiction? But how, or by what law is he to be punished, in case of conviction? Shall he be punished by the law of Pennsylvania, where the offense was committed, inasmuch as there is no other express law which reaches this case? And is it on account of the person only that jurisdiction is given to the courts of the United States. Does the 34th section of the judiciary act apply to the punishment of offenses, by which it is enacted, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trial at common law, in the courts of the United States, in cases where they apply?" May a person convicted in a court of the United States, of a crime of the highest grade, concerning which congress has made no provision, be punished, according to the opinion of Judge Story, in United States v. Coolidge, 1 Gallison 488, by fine and imprisonment, on the principles of the common law. Or is the constitution to be so construed, as to exclude the jurisdiction of all inferior courts, and yet suffer the authority of the supreme court to lie dormant, until called into action by a law which shall form a criminal code on the subject of consuls? These are questions which may embarrass those who have to answer them, but are not (552) necessary to be answered here. No embarrassment, however, could equal that into which this court would be thrown, should it determine, that no court of the United States has jurisdiction, in a case which affects a consul in every thing short of life, when the constitution declares, that the supreme court shall

have jurisdiction in all cases affecting him. Upon full consideration, I am of opinion, that the indictment should be quashed, because this court has no jurisdiction.

BRACKENRIDGE, J., concurred in the opinion to quash the indictment, because exclusive jurisdiction was vested in the courts of the United States. Concerning the privileges of a consul, he did not think it necessary to give an opinion.

Indictment quashed.

CONSERVA, THE, (1889, U. S.—Dominican Republic)
38 Fed. Rep. 431.
Benedict, District Court.

(434) (Extract) In disposing of the case it will be convenient at first to consider the point taken by the district attorney, that, the claim having been excepted to, the libel must be sustained because of insufficient proof of such an interest in the ship as entitled the consul of the Dominican republic to intervene in behalf of the Dominican government. Here there seems to be some misapprehension. This is not a case of property seized by the collector, nor of the property captured as prize, or taken by any kind of executive seizure, but a simple case in admiralty, where the decree will be either a decree dismissing the libel, or condemning the vessel. In such cases I do not understand that any decree of restitution is necessary. If the decree be adverse to the libelant, the decree is simply that the libel be dismissed, and the vessel discharged from the custody of the marshal. In such a case the intervention of a consul in behalf of his government, intervening for its interest in the vessel seems to me entirely proper. The more so in this case because it appears that the government of the Dominican republic has no representative here except the consul who has intervened. In numerous instances the intervention of a consul in the interest of citizens of his own country has been permitted. No reason is seen for refusing such permission when the intervention is in behalf of his own government. London Packet, 1 Mason, 14; The Adolph, 1 Curt. 87; The Bello Corrunes, 6 Wheat. 166. Such action on the part of the consul has nothing to do with negotiations with foreign states, nor is it an attempt to vindicate any prerogative of government. He simply represents his government as having an interest in the vessel proceeded against. Such interest is shown in this instance by a bill of sale, whereby the legal title of the vessel proceeded against has been passed to the government of the Dominican republic. This is proof, in my opinion, sufficient to permit the intervention of the consul for the purpose of contesting the question of forfeiture that has been raised by the libel. In the case

of The Meteor, Judge Betts declined to entertain a similar objection to the claim, upon the ground that the issue was immaterial in cases of this description, and the point was not pressed on the appeal.

COOKE v. WILBY, (1884, Great Britain)
25 Law Rep., Chancery Div. 770; 53 L. J. Ch. 592.
Chitty, Chancery Division.

(Extract) This was an ex parte application for leave to file an affidavit which had been sworn before a notary public at Birmingham, in the state of Alabama, U. S. A.

* * * * * * * * *

CHITTY, J.* * * Although there is a general provision in order xxxviii, rule 6, as to the swearing of affidavits in foreign parts out of Her Majesty's dominions before any of Her Majesty's consuls, or vice-consuls, there is no special provision applicable to a case where there is no consul or vice-consul within 150 miles of the deponent's residence.

In my opinion it would be an unreasonable construction of the rule to say that the deponent must travel 150 miles in order to swear his affidavit. I hold, therefore, that the old practice so far as regards this particular application is still in force, and that this affidavit may be filed.

COOPER, IN RE ANNE, (1855, Great Britain)
16 Common Bench 225.
Per Curiam, Common Pleas.

(Extract) The statutes 6 G. 4; C. 87; S. 20, did not authorize the British consul at Paris to take this affidavit. We cannot, therefore, receive it.

[The affidavit upon which the motion was made was sworn before the British consul at Paris.—Ed.]

COPPELL v. HALL, (1868, U. S.—Great Britain)
7 Wall. 542; 19 L. Ed. 246.
Swayne, Supreme Court.

(Syllabus) A contract made by a consul of a neutral power, with the citizen of a belligerent state, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.

CORIOLANUS, THE, (1839, U. S.)
Crabbe, 239; Fed. Cases 7,380.
Hopkinson, District Court.

Imprisonment of seamen.
Value of consul's certificate.

(Extract) On the second day after, when it might be supposed the matter was all over and forgotten, and nothing had occurred in the meantime to show any danger from it, a boat is sent to the ship with a police officer, and the man carried off to prison, without a hearing, or any examination of the circumstances of the case, except such as the captain chose to give to the consul. And here I would again correct an error into which captains are continually falling. They seem to believe that if they can get the consent or co-operation of the consul to their proceedings, it will be a full justification for them, when they come home. I wish them to understand that I will judge for myself, after hearing both parties and their evidence, of the necessity and propriety of these summary incarcerations; and the part the consul may have taken in it, will have very little weight with me. In all my experience, I have never known a consul refuse the application of a captain to imprison a seaman, nor to furnish a certificate, duly ornamented with his official seal, of the offense committed, of which he generally knows nothing but from the representations of the captain or officers of the vessel. I never suffer these certificates to be read: they are infinitely weaker than *ex parte* depositions. Our consuls, unfortunately, are merchants also; their profits and their living depend upon the business they can do , especially by the consignments of cargoes to them. It is, therefore, very important to them to have the good will of the captains of vessels, who may make a good report of them to their owners.

COURTNEY, THE, (1810, Great Britain)
Edwards. 241.
Sir William Scott, High Court of Admiralty.

[Seems to infer that the consent of the "accredited agent of their government" was requisite before the court would take jurisdictions of suits for wages.

Also seems to refer to consul when speaking of the "representatives of the United States." In this place if the American minister was meant it would seem that he would have been referred to as minister.—Ed.]

CRUTTENDEN v. BOURBELL, (1808, Great Britain)
1 Taunt. 144.
Per Curiam, Court of Common Pleas.

(Extract) There is no rule of court expressly applying to the case of fines levied by persons resident, abroad; but the rule relative to recoveries suffered by persons under these circumstances, has always been held to extend to the case of fines. By that rule, (Hilary term, 14 Geo. 3) it was ordered, that "if the party or parties shall be in Ireland, or any other parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of such warrant or warrants of attorney, and shall be sworn, either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where such acknowledgement shall be taken, having authority to administer on oath, and in the presence of a public notary;. which notary shall also certify in writing under his hand and seal, as well the due administering of the said oath, as also the name, signature, and office of the magistrate administering the same." In this case the certificate is not under seal; neither is it stated that the notary was present when the oath was taken, or that the mayor of Neufchatel had authority to administer an oath.

DAINESE v. HALE, (1875, U. S.)
91 U. S. 13.
Bradley, Supreme Court.

(15) (Extract) It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant; for it is conceded that this is not the case in Christain countries. And whilst, on the other side, it is also conceded that in pagan and Mohometan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British foreign office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim anything more. They say,—

"The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the queen, in the exercise of the power vested in her majesty by act of parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects." Int. Law, vol. II. p. 273, sec. 276.

Historically, it is undoubtedly true, as shown by numerous

authorities quoted by Mr. Warden in his treatise on "The Origin and Nature of Consular Establishments," that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the (16) changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent.

DALLEMAGNE v. MOISAN, (1904, U. S.—France)
197 U. S. 170.
Peckham, Supreme Court.

Appeal from the district court of the United States for the Northern District of California.

This is an appeal on the part of the consul general of the Republic of France from the judgment of the district court of the United States for the Northern District of California, discharging the defendant Moisan from imprisonment.

The proceeding arises on habeas corpus, to inquire into the validity of the detention of defendant in the city prison of San Francisco, in the state of California. His application for the writ was addressed to the district court of the United States for the Northern District of California, and it showed that he was a citizen of France and was imprisnned by virtue of a requisition in writing, signed by the French consul general residing in San Francisco and addressed to the chief of police of San Francisco, California, requiring his arrest as one of the crew of the French ship Jacques, then in that port, on account of his insubordinate conduct as one of such crew. (The requisition contained all the averments of facts which would warrant the arrest of the petitioner under the provisions of the treaty of 1853 between the United States and France.) The petitioner also averred that at the time of the making of his application for the writ the ship was not in the port of San Francisco, but had departed therefrom some time before. The petitioner was arrested by the chief of police, under such requisition, on the first day of May 1903, and since that time had been confined in the city prison of San Francisco. He asserted that his imprisonment was illegal, because the facts set forth did not confer jurisdiction upon the consul or the

chief of police, or either of them, to restrain complainant from his liberty, or to imprison him.

* * * * * * * * *

(173) * * * Mr. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

This case involves the construction of certain language in the eighth article of the consular convention between the United States and France, concluded on the twenty-third day of February, 1853, and proclaimed by the President of the United States on the twelfth day of August, 1853, the whole convention being still in full force and effect. 10 Stat. 992, 996. The article is reproduced in the margin.

Article VIII. The respective consuls general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

The first objection made by the defendant is to the validity of the requisition of the consul general, because it was directed to the chief of police of San Francisco, he being an officer of the state as distinguished from a federal officer, the defendant contending that a federal treaty cannot impose on a state officer, as such, a function violating the constitution of the (174) state which he represents in his official character. It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the state. Prigg v. Pennsylvania, 16 Pet. 539, 622; Robertson v. Baldwin, 165 U. S. 275. As to the objection that there was any statute or any constitutional provision of the state, prohibiting the execution of the power conferred by the treaty upon the state officer, we think it unfounded. We find nothing in the constitution or in the statutes of California which forbids or would prevent the execution of the power by a state officer, in case he were willing to execute it. The

provisions in the constitution of the state, cited; by counsel for defendant, relate in substance only to the general proposition that no person should be deprived of his liberty without due process of law. The execution of a treaty between the United States and a foreign government, such as the one in question, would not violate any provision of the California constitution; the imprisonment is not pursuat to a conviction of crime but is simply a temporary detention of a sailor, whose contract of service is an exceptional one, Robertson v. Baldwin, supra, for the purpose of securing his person during the time and under the circumstances provided for in the treaty, as concerning the internal order and discipline of the vessel. The murder on a foreign vessel, while in one of the ports of this country, of one of the crew of such vessel by another member of that crew has been held not to come within the terms of a somewhat similar treaty with Belgium, because the crime charged concerned more than the internal order or discipline of the foreign vessel. Wildenhus's case, 120 U. S. 1.

The chief of police voluntarily performed the request of the consul as contained in the written requisition, and the arrest was, therefore, not illegal so far as this ground is concerned.

There is another difficulty, however, and that is founded upon the provisions of the statutes of the United States. By (175) the act of congress, approved June 11, 1864, 13 Stat. 121 entitled "An act to provide for the execution of treaties between the United States and foreign nations respecting consular jurisdiction over the crews of vessels of such foreign nations in the waters and ports of the United States," full provision was made for the execution of such treaties. It was therein provided (section second) that application for the arrest might be made "to any court of record of the United States, or any judge thereof, or to any commissioner appointed under the laws of the United States." The act then provided for the issuing of a warrant for the arrest of the individual complained of, directed to the marshal of the United States, and requiring him to arrest the individual and bring him before the court or person issuing the warrant, for examination, and if, on such examination, it appeared that the matter complained of concerned only the internal order or discipline of the foreign ship, the court should then issue a warrant committing such person to prison, etc. It was further provided that no person should be detained more than two months after his arrest, but at the end of that time he should be allowed to depart and should not again be arrested for the same cause. The act was carried forward, in substance, into the Revised Statutes of the United States as sections 4079, 4080, 4081. See also 2 Comp. Stat,

page 2776. This statute having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose. Consequently, the requisition of the consul general should have been presented to the district court or judge, etc., pursuant to the act of congress, and the arrest should have been made by the marshal as therein provided for. Therefore the arrest of the seaman by the chief of police was unauthorized. When, however, the defendant was brought before the District Court of the United States upon the writ of habeas corpus, that court being mentioned in the statute as one of the authorities to issue warrants for the arrest of the (176) individual complained of, and having power under the statute to examine into the question and to commit the person thus arrested to prison according to the provision of the act, it would have been the duty of the court, under such circumstances, upon the production of the defendant under the writ, and upon the request of the consul, to have made an examination, and to have committed the defendant to prison if he were found to come under the terms of the treaty. It was, therefore, but a formal objection to the regularity of the arrest, which would have been obviated by the action of the court in examining into the case, and the defendant would not have been entitled to discharge merely because the person executing the warrant was not authorized so to do.

The important question remains as to the true construction of the eighth article of the treaty, with reference to the limitation of the imprisonment of the person coming within its terms. The district court has held that the imprisonment must end with the departure of the vessel from the port at which the seaman was taken from the vessel. This we regard as an erroneous construction of the terms of the article.

The provisions of that article seem to us plain, and they refer to the imprisonment of the seaman and his detention during the time of his stay in port, and the language does not refer in that respect to the stay of the ship in port. The treaty provides that the local authorities shall lend forcible aid to the consuls when they may ask for the arrest and imprisonment of persons composing the crew, whom they may deem it necessary to confine. The language has no reference whatever to the ship, and they (the persons arrested) are held during their stay in the port "at the disposal of the consul." Surely the ship is not held at the disposal of the consul. It is the persons arrested who are held, and they are to be released at the mere request of the consul, made in writing, and the expenses of the arrest and detention of the persons arrested are to be paid by the

consul. From the language of the treaty the departure of the ship from the port need have no effect (177) whatever upon the imprisonment of the persons arrested. The statute (sec. 4081 of the Rev. Stat.) provides that the imprisonment shall in no case last longer than two months, and at the end of that time the person arrested is to be set at liberty, and shall not again be arrested for the same cause. The statute makes no reference to the stay of the vessel in port, and the legislative construction of the treaty is that the imprisonment is not limited by the departure of the ship. Therefore the statute provides that such imprisonment shall not last, in any event, longer than two months. That term might end while the vessel was still in port. This construction not only carries out the plain language of the treaty, but, it seems to us, it is its reasonable interpretation. A vessel may arrive in port with a mutinous sailor, whose arrest is asked for under the treaty. When imprisoned pursuant to the terms of the treaty he ought not to be discharged without the request of the consul while within the limit of the term of imprisonment provided by the statute, simply because the vessel from which he was taken has left the port. If that were so the result would be either that the sailor would be discharged as soon as the ship left the port, or, in order to prevent such discharge, he would be taken on board the ship again, and probably be placed in irons. The ship might then continue a voyage which would not bring it back to France for months. During this time the sailor might be kept in irons and in close confinement on board ship, or else the discipline and safety of the ship might be placed in peril. By the other construction, although the ship had left the port without the mutinous sailor, he would not be entitled to his discharge from imprisonment within the two months provided for by the statute, and this would give an opportunity to the consul to send the sailor back to France at the earliest opportunity and at the expense of the French government, by a vessel which was going directly to that country.

The district court erred in discharging the defendant before the expiration of the two months provided for in the act of (178) congress, and against the protest of the French consul. Less than one of the two months of imprisonment permitted by the statute had expired when the defendant was discharged. The order discharging him must be reversed and the defendant remanded to imprisonment in a prison where prisoners under sentence of a court of the United States may be lawfully committed, Rev. Stat. Sec. 4081, subject to the jurisdiction of the French consular authority of the port of San Francisco, but such imprisonment must not exceed, when taken with the former imprisonment of the defendant, the term of two months in the aggregate.

Reversed, and remanded for further proceedings consistent with this opinion.

Mr. JUSTICE HARLAN dissented.

DALY, IN RE, (1841, Great Britain)
9 D. P. C. 380.
Tindal, Court of Common Pleas.

Talfourd, Serj., moved that the certificate of the acknowledgment of the deed in this case might be filed, under the provisions of the Fines and Recoveries Act, (3 & 4 Wm. 4 C. 75). A special commission had issued to St. Petersburg, and the papers had been returned, the affidavit, verifying the certificate, being sworn before the British consul there. The 6 Geo. 4, C. 87, S. 20, empowered British consuls abroad to take affidavits, and to do such notarial acts as any notary public might do. The question was, whether the affidavit ought to have been made before the local officers of the country, or whether it was not sufficient that it had been sworn before the consul? (Bosanquet, J. Do your affidavits show that there is any difficulty in procuring the affidavit to be sworn before the local authorities?) They do not, but the court would in a case of this description, exercise a discretion with regard to the reception of the affidavit. In France, the officers of that country were forbidden to take affidavits, and the court had, in cases coming from that country, received affidavits sworn before the British consul.

Tindal, C. J.—Perhaps you can remove the difficulty by procuring an affidavit, shewing that there is an objection on the part of the magistrates of the country to swear affidavits. You had better renew your application.

Talfourd, Serj., on a subsequent day, intimated to the court that he had ascertained that a similar application had been made about two years ago, when it was stated that the magistrates of Russia were not empowered to take affidavits. This, it was submitted, removed the difficulty which existed.

Tindall, C. J.—Let it pass.

DARLING, IN RE, (1845, Great Britain)
2 M. & G. & S. 347.
Tindall, Court of Common Pleas.

(Syllabus) The court allowed an acknowledgment to be received and filed under the 3 & 4 W. 4. C. 74. S. 85., where the affidavit verifying the same was sworn before "The provisional British consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could have been sworn, within many hundred miles.

DAVENPORT, IN RE, (1904, U. S.—Italy)
89 N. Y. Supp. 537; 43 Misc. 573.
Church, Surrogate's Court, Kings County.

[Decisions are contradictory and it is to be regretted that no appellate decision has been given.

The Italian consul has the right to "intervene which would include the right to receive the property belonging to the alien and hence the money in question here should be paid over to the consul-general."—ED.]

DAVIS v. LESLIE, (1848, U. S.)
1 Abb. Adm. 123; Fed. Cases 3,639.
Betts, District Court.

(131) (Extract) I do not think the first objection, that the court is without jurisdiction of a suit for wages between foreigners, so far as it rests upon the idea that foreigners are without a standing in court, can be maintained. There has been, on the part of maritime courts, both of England and America, a very general disinclination to entertain such suits, and they have in several cases declined to take jurisdiction, in language which almost amounts to a denial of the power to take it. But I understand the weight of authority in both countries to be, that upon the one hand the courts are not without ample power to hear and determine such suits, when the circumstances of the case before them seem to render it fit that they should do so; while, upon the other hand, they are not bound to do this, but will, in general, from motives of international comity, of delicacy, and of convenience, decline the suit. In other words, the foreign libellant is regarded as not entitled to invoke the powers of the court, as matter of absolute right; yet where the court is satisfied that justice requires its interposition in his favor, those powers may be, and will be exercised in his behalf.

That there is vested in the court at least a latent jurisdiction over these actions, which may be exercised under the (132) guidance of a sound discretion, seems to be clearly shown by reference to those cases in which, both in England and America, suits between foreigners have been entertained in admiralty, on the ground of a special necessity. The Courtney, Edw. Adm. R. 239; The Wilhelm Frederick, 1 Hagg. Adm. R. 138; Ellison v. The Bellona, Bee's Adm. R. 112; Willendson v. The Forsoket, 1 Pet. Adm. R. 196; Moran v. Bauden, 2 Ib. 415; Weiberg v. The Oloff, Ib. 428.

The very question has, moreover, been brought under thorough

discussion in England, as recently as 1840, in the case of The Golubchick, 1 W. Rob. 143. This case was a libel *in rem* for wages. The master appeared under protest to the jurisdiction, grounded on the fact that the suit was between foreigners. In delivering his opinion against the protest, Dr. Lushington reviews the previous English cases on the subject, and thus expresses the views taken by himself:

"Upon general principles, I am inclined to hold that this court does possess a competent jurisdiction to adjudge in these cases;—at the same time the exercise of this jurisdiction is discretionary with the court; and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the court must decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself in which this difficulty might arise, that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice; in such cases, undoubtedly, the court would decline to adjudicate."

The cases in this country, upon the whole, sustain the same doctrine.

DAVIS v. THE BURCHARD, see The Burchard.

DAVIS v. PACKARD, (1832, U. S.)
6 Pet. 41.
Thompson, Supreme Court.

(47) THOMPSON, J., delivered the opinion of the court.

This case comes up on a writ of error to the court for the correction of errors in the state of New York, being the highest court of law in that state, in which a decision in this suit could be had. And a motion has been here made to dismiss the writ of error for want of jurisdiction in this court.

From the record returned to this court, it appears that the cause went up to the court for the correction of errors in New York upon a writ of error to the supreme court of that state; and that in the court of errors, the plaintiff assigned as error in fact, that he, Charles A. Davis, before and at the time of the commencement of the suit against him, was and ever since hath continued to be, and yet is consul-general in the United States of his majesty, the king of Saxony, duly admitted and proved as such by the president of the United States. And being such consul, he ought not, according to the constitution and laws of the United States, to have been impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognizance of the said cause. To this as-

signment of errors, the defendants in error answered, that there was no error in the record and proceedings aforesaid, nor in giving the judgment aforesaid, because they say, that it (48) nowhere appears by the said record, proceedings, or judgment, that the said Charles A. Davis ever was consul of the king of Saxony, and they pray that the said court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matter aforesaid, above assigned for error, and that the judgment aforesaid may be in all things affirmed.

The record then states, whereupon the court for the correction of errors, after having heard the counsel for both parties, and diligently examined, and fully understood, the causes assigned for error, and inspected the record and process aforesaid, did order and adjudge that the judgment of the supreme court be in all things affirmed.

The motion made in this court to dismiss the writ of error is founded and resisted upon affidavits, on each side, disclosing what took place in the court of errors in New York, on a motion there made to dismiss the writ of error to the supreme court of that state, and the opinion of the chancellor delivered in the court of errors, assigning his reasons for affirming the judgment of the supreme court, has also been laid before us.

We cannot enter into an examination of that question at all: whatever took place in the state court, which forms no part of the record sent up to this court, must be entirely laid out of view. This is the established course of this court, and neither the opinion of the chancellor, or the proceedings on the motion, forms a part of the record. 12 Wheat. 118. The question before the court is, whether the judgment was correct, not the ground on which that judgment was given. 6 Wheat. 603.

It has also been settled, that in order to give jurisdiction to this court under the 25th section of the judiciary act, (2d vol. Laws U. S. 65,) it is not necessary that the record should state in terms that an act of congress was in point of fact drawn in question. It is sufficient, if it appears from the record that an act of congress was applicable to the case, and was misconstrued, and the decision in the state court was against the privilege or exemption specially set up under such statute. 4 Wheat. 311; 2 Pet. 250; 3 Id. 301; 4 Id. 429. How stands the record, then, in this case? Charles A. Davis alleges that he is consul-general of the king of Saxony in the United States, and that he is thereby privileged from being sued in the (49) state court, according to the constitution and laws of the United States. The fact of his being such consul is not denied by the joinder in error. The answer given is, that it nowhere appears by the record,

proceedings, or judgment of the supreme court, that the said Davis was such consul; and the court of errors, in giving judgment say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of congress, which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls and vice-consuls. (2d vol. Laws U. S. 60, sect. 9.)[1]

The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors, that is to be reviewed here. That is, the final judgment in the highest court in the state, and none other, can be brought into this court, under the 25th section of the judiciary act.

Whether it was competent for Davis in the court of errors to assign, as error in fact, his exemption from being sued in a state court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring that no such question could have been made. For if the court of errors had entertained the opinion that such exemption could not be assigned for error in that court, the writ of error would probably have been dismissed. Or if the court had understood that the fact of his being consul was denied, an issue would probably been directed to try that fact, under a provision in a statute of that state, which declares: "That whenever an issue of fact shall be joined upon any writ of error, returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ, or the proceedings thereon, the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties, to try such question of fact at the proper circuit court or sittings, and to certify (50) the verdict thereupon to the said court for the correction of errors." (2d vol. Rev. Stat. New York, 601.)

From the record, then, we are necessarily left to conclude that the state court, assuming or admitting the fact that Davis was consul-general, as alleged in his assignment of errors, yet [decided that] it did not exempt him from being sued in a state court, which brings the case within the 25th section of the judiciary act; the decision having been against the exemption set up and claimed under a statute of the United States.

[1] Stats. at Large, 76.

The motion to dismiss the writ of error is accordingly denied.
7 P. 276; 10 P. 368; 14 P. 614; 5 O. 140.

DAVIS v. PACKARD, (1833, U. S.)
7 Pet. 276.
Thompson, Supreme Court.

THOMPSON, J., delivered the opinion of the court.

(281) The writ of error in this case brings up for review, a judgment recovered against the plaintiff in error in the court for the correction of errors, in the state of New York. The case was before this court at the last term, (6 Pet. 41,) on a motion to dismiss the writ of error for want of jurisdiction. This court sustained its jurisdiction under the 25th section of the judiciary act, on the ground that the decision in the state court was against the exemption set up by the plaintiff in error; namely: that he, being consul-general of the king of Saxony in the United States, the state court had not jurisdiction of the suit against him. The principal difficulty in this case seems to grow out of the manner in which the exemption set up by the plaintiff in error, was brought under the consideration of the state court, and in a right understanding of the ground on which the court decided against it.

As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c. And the judiciary act of 1789, (2 Laws U. S. sect. 9,[1] gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The record sent up with the writ of error in this case, shows that the suit was commenced in the supreme court of the state of New York; and that the plaintiff in error did not plead or set up his exemption in that court; but on the cause being carried up to the court for correction of errors, this matter was assigned for error in fact; notwithstanding which the court gave judgment against the plaintiff in error.

It has been argued here, that the exemption might have been excluded by the court for the correction of errors, on the ground that it was waived by not having been pleaded in the supreme court. It is unnecessary to decide definitely whether, if such had been the ground on which the judgment of the state court rested, it would take

[1] Stats. at Large, 76.

the case out of the revising power of this court under the 25th section of the judiciary act; for we cannot say, judging from the record, that the judgment (282) turned on this point; but, on the contrary, we think the record does not warrant any such conclusion.

It has been repeatedly ruled in this court, that we can look only to the record to ascertain what was decided in the court below. The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. And it is the judgment of the court of errors, and not of the supreme court, with which we have to deal.

Looking, then, to the record, we find that when the cause went up upon a writ of error from the supreme court, to the court for the correction of errors, it was assigned as error in fact, that Charles A. Davis, before and at the time of commencing the suit against him, was, and ever since has continued to be, and yet is, consul-general of his majesty the king of Saxony, in the United States, duly admitted and approved as such by the president of the United States.

The record shows no objection to the time and place, when and where this matter was set up, to show that the supreme court of New York have not jurisdiction of the case. The only answer to this assignment of errors is, that there is no error in the record and proceedings aforesaid, nor in the giving the judgment aforesaid, because it nowhere appears by the record, proceedings or judgment, that the said Charles A. Davis ever was consul of the king of Saxony.

This was no answer to the assignment of errors. It was not meeting or answering the matter assigned for error. It is not alleged in the assignment of errors that it does appear, by the proceedings or judgment in the supreme court of New York, that Charles A. Davis was consul of the king of Saxony.

Matter assigned in the appellate court, as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law.

Suppose infancy should be assigned as error in fact; would it be any answer to say that it nowhere appeared by the record, that the defendant in the court below was an infant.

The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.

But the answer to the assignment of errors prays that the (283) court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matters aforesaid above assigned for error.

Under this informal state of the pleadings in the court for the

correction of errors, how is this court to view the record? The most reasonable conclusion is that the court disregarded matters of form, and considered the answer of the defendants in error as a regular joinder in error. And this conclusion is strengthened when we look at the form of the entry of judgment. "Whereupon the said court for the correction of errors, after having heard the counsel for both parties, and diligently examined and fully understood the causes assigned for error," &c. affirms the judgment.

The only cause assigned for error was that Charles A. Davis was, consul-general of the king of Saxony; and the conclusion must necessarily follow that this was not, in the opinion of the court, a sufficient cause for reversing the judgment. If it had been intended to say it was not error, because not pleaded in the court below, it would probably have been so said. Although this might not perhaps have been strictly technical, yet as the court gave judgment on the merits, and did not dismiss the writ of error, it is reasonable to conclude, that the special grounds for deciding against the exemption set up by the plaintiff in error, would have been in some way set out in the affirmance of the judgment.

If any doubt or difficulty existed with respect to the matters of fact set up in the assignment of errors, the court for the correction of errors was, by the laws of New York, clothed with ample powers to ascertain the facts.

The statute (2 Laws N. Y. 601) declares, "that whenever an issue of fact shall be joined upon any writ of error returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ or the proceedings thereon; the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties to try such question of fact, at the proper circuit court or sittings; and to certify the verdict thereupon to the court for the correction of errors."

(284) No such issue having been directed, we must necessarily conclude that no question of fact was in dispute; and as the record contains no intimation that this matter was not set up in proper time, the conclusion would seem irresistible, that the court for the correction of errors considered the matter itself, set up in the assignment, as insufficient to reverse the judgment. This being the only question decided in that court, is the only question to be reviewed here: and viewing the record in this light, we cannot but consider the judgment of the state court in direct opposition to the act of congress, which excludes the jurisdiction of the state courts in suits against consuls.

But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the su-

preme court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect.

If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments. That it is not considered a personal privilege in England, is evident from what fell from Lord Ellenborough in the case of Marshall v. Critico, 9 East, 447. It was a motion to discharge the defendant from arrest on common bail on the ground of his privilege under the statute 7 Ann, c. 12, as being consul-general from the Porte. Lord Ellenborough said, this is not a privilege of the person, but of the state he represents, and the defendant having been divested of the character in (285) which he claims that privilege, there is no reason why he should not be subject to process as other persons; and the motion was denied on this ground.

Nor is the omission to plead the privilege deemed a waiver in England, as is clearly to be inferred from cases where application has been made to discharge the party from execution, on the ground of privilege under the statute of Ann, which is considered merely as declatory of the law of nations; and no objection appears to have been made, that the privilege was not pleaded. 3 Burr. 1478, 1676.

It may not be amiss barely to notice another argument which has been pressed upon the court by the counsel for the defendants in error, although we think it does not properly arise upon this record.

It is said the act of congress does not apply to this case, because, being an action upon a recognizance of bail, it is not on original proceeding, but the continuation of a suit rightfully commenced in a state court.

The act of congress is general, extending to all suits against consuls; and it is a little difficult to maintain the proposition, that an action of debt upon recognizance of bail is not a suit.

But we apprehend the proposition is not well founded; that it is not, in legal understanding, an original proceeding.

It is laid down in the books, that a *scire facias* upon a recognizance

of bail is an original proceeding, and if so, an action of debt upon the recognizance is clearly so. A *scire facias* upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit.

It is argued, that debt on recognizance of bail, is a continuation of the original suit, because, as a general rule, the action must be brought in the same court. Although this is the general rule, because that court is supposed to be more competent to relieve the bail when entitled to relief, yet, whenever from any cause the action cannot be brought in the same court, the plaintiff is never deprived of his remedy, but allowed to bring his action in a different court, as where the bail moves out of the jurisdiction of the court. This is the settled rule in the state of New York; and it is surely a good reason for bringing (286) the suit in another court, when the law expressly forbids it to be brought in the same court where the original action was brought. 2 Wil. Saund. 71, a; Tidd's Practice, 1099, 6th ed.; 2 Archb. Prac. 86, book 3, c. 3; 7 Johns. 318; 9 Johns. 80; 12 Johns. 459; 13 Johns. 424; 1 Chit. 713; 18 Common Law, 212, n. a.

But the reversal of the judgment in this case it put on the ground that from the record we are left to conclude, that the court for the correction of errors decided that the character of consul-general of the king of Saxony, did not exempt the plaintiff in error from being sued in the state court.

Judgment reversed.

DAVY, AND OTHERS, TO MALTWOOD, (1841, Great Britain)
2 Manning and Granger's Reports (Common Pleas), 424.
Tindal C. J., Common Pleas.

In October 1840, a special commission was obtained to take the acknowledgment of Sarah Ann, the wife of Samuel Davy, then and still residing at St. Petersburg, in Russia, of a deed executed by her on the conveyance of a copyhold, parcel of the manor of Lambeth, to which she was entitled with her two sisters, in coparcenary. The acknowledgment being taken and the common certificate of acknowledgment, and an affidavit of the due taking, being returned, those documents were brought for enrolment, pursuant to the 3 and 4 W. 4 c. 74. s. 85; but the officer appointed by the court, refused to file them without the order of the court, on the ground that the affidavit of the due taking of the acknowledgment appeared to be sworn before the British consul at St. Petersburg, and that a consul did not come within the description of "a person duly authorized to take affidavits in the court of common pleas," or "a magistrate."

On a former day in this term, Talfourd Serjt. moved that the certificate might be enrolled. The rules made in Hilary term 1834 are silent as to the description of persons before whom the affidavit is to be sworn. The practice with respect to acknowledgments taken abroad is understood to have arisen out of the adoption, by the officers, of the regulations prescribed by the rule of this court of Hilary term, 14 G. 3. as to common recoveries; which regulations had been previously adopted as to fines, Cruttenden v. Bourbel, A consul is not a magistrate; but he is a person authorized to administer oaths under the 6 G. 4. c. 87. s. 20., and is much more competent to administer the oath correctly than a Russian magistrate ignorant, probably, of the language and of the usages of this country. It is suggested, though the fact is not embodied in an affidavit, that in Russia a great difficulty exists in obtaining the administration of oaths. In France, the magistrates refuse to administer oaths in such cases; and the court now receives affidavits sworn in that country before the British consul or vice-consul, although formerly the practice, as to fines, was otherwise: Hutchinson, *ex parte*. The learned serjeant referred also to cases of acknowledgments taken at Hamburg. Edye and Others to Lord Rolle.

TINDALL C. J. An affidavit may probably be made, that a difficulty exists in getting an affidavit sworn before a magistrate in Russia; if not, the affidavit should go back to be resworn.

Talfourd Serjt., on this day renewed his application, and referred to a case in which this court had, two years before upon a notarial certificate as to the state of the law of Russia in this respect, allowed the certificate of an acknowledgment taken in Russia to be enrolled. In that case a commission had issued to take the acknowledgment of Mrs. Sophia Gordon Handyside, then residing at St. Petersburg, and the notarial certificate concluded as follows:

"And I further certify that the laws of Russia do not grant the authority to any magistrate to administer oaths to any person whatsoever. And that in virtue of an act of parliament passed in the reign of his late Britanic majesty George IV, the British consul is authorized to administer oaths.

"Thomas Bishop,
(Not. Pub.)"

"16 Aug. 1838.

"Old Style."

TINDALL C. J. I think the document may be enrolled.

The rest of the court concurring—Order made.

DE GIVE v. GRAND RAPIDS FURNITURE CO., (1894, U. S.—Belgium)
94 Ga. 605; 21 S. E. 582.
Van Epps, Georgia Supreme Court.

[Federal courts do not, since the repeal of 8th clause of § 711 of Rev. Statutes, have exclusive jurisdiction over consuls and civil suits may be brought against them in the state courts.—ED.]

DE LEMA v. HALDIMAND, (1824, Great Britain)
1 Ry. & M. 45; 2 Phillm. (2d Ed.) 292; 1 Car. & P. 183.
Abbott, King's Bench.

[Spanish consul-general sued for fees for giving certificates that certain bonds had been delivered up—consul attended at the counting-house of the defendant, and claimed that this "did not fall within the ordinary duties of a consul, for which alone he received a salary from his government.—ED.]

ABBOTT LD. C. J. I am of opinion that this action cannot be sustained. The plaintiff was, in the present instance, acting as the officer of his own government, and in direct conformity to instructions which he had received. In cases where he acts between one individual and another, he may be entitled to receive fees. But here he is acting directly as the officer of his own government.

DENT v. SMITH, (1869, Great Britain)
Law Rep. 4 Queen's Bench 414.
Queen's Bench.

[Case involving the consideration of the action of the Russian consul at Constantinople, who had appointed a curator of the wreck and three persons to assess expenses.—ED.]

DILLON, IN RE, (1854, U. S.—France)
7 Sawy. 561; Fed. Cases 3914; 5 Moore 78.
Hoffman, District Court.

1. Consuls not Amenable to Subpœna.—The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law, or consuls, who by express treaty, are not amenable to the process of the courts.

2. Subpœna *Duces Tecum*—Official Documents.—Where a subpœna *duces tecum,* directed to a consul of France, is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure.

(562) The facts appear in the opinion of the court.

S. W. Inge, United States Attorney.

C. Temple Emmett, attorney for Del Valle.

HOFFMAN, J. In this case the counsel of Senor Del Valle, a defendant now on trial on an indictment found against him in this court, obtained a subpœna *duces tecum,* directed to P. Dillon, commanding him to appear in court and produce a document said to be in his possession, and deemed material for the defense of the accused. The subpœna was returned served, but no return was made to the subpœna by M. Dillon, stating his consular privileges or other exemption from the process of the court. The witness having failed to appear, an attachment to compel his appearance was moved for and obtained. On being brought into court, M. Dillon, who is the consul of France at this port, protested against the compulsory process which had been issued, and while he disavowed any disrespect to the court, he claimed the immunity from compulsory process, requiring him to appear as a witness, secured to the consuls of France and America, by the second article of the convention ratified April 1, 1853. He was informed by the court that it was ready to hear the question whether the provisions of the convention applied to the present case fully discussed; the argument was fixed for the succeeding day, and M. Dillon discharged. The discussion that has since taken place, would perhaps more regularly have arisen on the return of the process, or on that of a rule to show cause why an attachment should not issue. The counsel of M. Dillon were invited, however, by the court, to argue the subject as fully as if on motion for an attachment; and the whole question has been ably and elaborately discussed by him as well as by the counsel for the defendant on the trial.

The question presented to the court is, whether it has the power, on the motion of the defendant, accused of a crime against the laws of the United States, to issue and enforce compulsory process to the consul of France, requiring him (563) to appear in court and testify in behalf of the defendant, notwithstanding the provisions of the article of the convention, before cited.

By the terms of that article, it is stipulated between the United States and France that their consuls shall never be compelled to appear in court as witnesses. They may, however, be invited to attend, and if unable to do so, the article provides, that they may be examined orally at their houses, or their depositions taken.

By the sixth amendment to the constitution of the United States, it is provided that the accused in all criminal prosecutions shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

It is urged by the counsel for the accused that this right is sacred, and secured to him by the constitution of the United States; that it is comprehensive and wihout exception, and that neither by law nor treaty can he be deprived of the right of compelling the attendance of any person whose testimony may be material to his defence.

It was admitted by the counsel of M. Dillon, that if the constitution secures to the accused this right in the present case, he cannot be deprived of it by any treaty stipulation; and that if the court is called upon to choose between allowing a constitutional right to a prisoner and disregarding a treaty stipulation, or denying the constitutional right and respecting the treaty, its highest allegiance is due to the constitution, and the rights therein guaranteed must be maintained.

The question then to be determined is: Is the treaty stipulation alluded to irreconcilably in conflict with the constitutional provision cited?

In approaching the consideration of this question, it is impossible for the court not to be profoundly impressed with a sense of its importance—not merely abstractly, but on account of consequences its decision may involve. On the one hand, it is asked to deny the accused a right claimed to be secured under the fundamental law of the land. On the other, it is urged not merely to hold a law of congress void for unconstitutionality—a duty at all times the most (564) delicate and important an American court of justice is called upon to perform—but to declare a solemn treaty stipulation, entered into between the United States and a foreign country, to the faithful observance of which the honor of the nation is pledged, inoperative and void, because those by whom it was made had no power to enter into such engagements.

By the constitutional provision referred to, the accused has the right to compulsory process to obtain witnesses in his favor.

Does, then, this provision extend to every person within our territory, whether or not he be an ambassador or other public minister, and whether or not he be, by treaty stipulation or express law, exempted from the duty of obedience to a subpœna? And can the court, on his disobeying the writ, compel his obedience by fine and imprisonment?

If the accused, by virtue of the constitutional provision in this case, can compel the attendance of the consul of France, it seems necessarily to follow that the attendance of an ambassador could in like manner be enforced.

The immunity afforded to, and personal inviolability of ambassadors now universally recognized by the laws of nations, has been

proceedings, or judgment of the supreme court, that the said Davis was such consul; and the court of errors, in giving judgment say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of congress, which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls and vice-consuls. (2d vol. Laws U. S. 60, sect. 9.)[1]

The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors, that is to be reviewed here. That is, the final judgment in the highest court in the state, and none other, can be brought into this court, under the 25th section of the judiciary act.

Whether it was competent for Davis in the court of errors to assign, as error in fact, his exemption from being sued in a state court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring that no such question could have been made. For if the court of errors had entertained the opinion that such exemption could not be assigned for error in that court, the writ of error would probably have been dismissed. Or if the court had understood that the fact of his being consul was denied, an issue would probably been directed to try that fact, under a provision in a statute of that state, which declares: "That whenever an issue of fact shall be joined upon any writ of error, returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ, or the proceedings thereon, the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties, to try such question of fact at the proper circuit court or sittings, and to certify (50) the verdict thereupon to the said court for the correction of errors." (2d vol. Rev. Stat. New York, 601.)

From the record, then, we are necessarily left to conclude that the state court, assuming or admitting the fact that Davis was consul-general, as alleged in his assignment of errors, yet [decided that] it did not exempt him from being sued in a state court, which brings the case within the 25th section of the judiciary act; the decision having been against the exemption set up and claimed under a statute of the United States.

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[1] Stats. at Large, 76.

The motion to dismiss the writ of error is accordingly denied.
7 P. 276; 10 P. 368; 14 P. 614; 5 O. 140.

DAVIS v. PACKARD, (1833, U. S.)
7 Pet. 276.
Thompson, Supreme Court.

THOMPSON, J., delivered the opinion of the court.

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As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c. And the judiciary act of 1789, (2 Laws U. S. sect. 9,[1] gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The record sent up with the writ of error in this case, shows that the suit was commenced in the supreme court of the state of New York; and that the plaintiff in error did not plead or set up his exemption in that court; but on the cause being carried up to the court for correction of errors, this matter was assigned for error in fact; notwithstanding which the court gave judgment against the plaintiff in error.

It has been argued here, that the exemption might have been excluded by the court for the correction of errors, on the ground that it was waived by not having been pleaded in the supreme court. It is unnecessary to decide definitely whether, if such had been the ground on which the judgment of the state court rested, it would take

[1] Stats. at Large, 76.

which have been referred to, and to place the accused in a position to make his defence and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt. If, then, the accused, by virtue of these provisions, enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing with the government, it would seem that the object of the constitution is accomplished. Such seems to have been the construction given by congress to this provision of the constitution.

By section twenty-nine of the crimes act of April 30, 1790, it is provided, "that every person accused or indicted under that act, shall have the like process of the court where he shall be tried, to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on the prosecution against them."

The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance.

If, then, the object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them, it follows that if by general principles of the laws of nations, as in the case of an ambassador, or by positive treaty stipulations, as in the case of the consul of France, the person sought to be made a witness be beyond the process of the court, neither the accused nor the prosecution is entitled to process against him. The ambassador is, as we have seen, not amenable (568) in any respect to the laws of the country to which he is sent. The consul is by a treaty, which is the supreme law, placed beyond the reach of the process of the court. The cases seem not distinguishable in principle; for in each the accused, as well as the prosecution, is unable to secure the attendance of the witness, because he is beyond the reach of the court. The hardship to the accused is in no respect greater than if the witness were in a district or in a foreign country into which the process of the court could not run.

From all the provisions of the consular convention, it is obvious that it was intended to clothe the consul with some at least of the privileges of ambassadors, and so far as compelling his attendance as a witness is concerned, to place him beyond the reach of the process of the courts. He is, therefore, out of the jurisdiction to the same extent and in the same manner as the ambassador, who is regarded, by a fiction of law, as retaining his domicile in his own country, and beyond the jurisdiction of the country in which he actually resides.

It is urged that it was decided by Mr. Chief Justice Marshall, on Burr's trial, that the constitutional provision extends to all persons whatever. But in that case, the point to be determined by the chief justice, was whether the accused possessed the right to compulsory process to obtain the production, by the president of the United States, of papers in his possession, deemed material for the defence. Chief Justice Marshall held that the subpœna *duces tecum* should issue; but in treating of the question whether it could issue to the president of the United States, the attention of the court was exclusively directed to the point whether by law the president was exempt from such process. The case of an ambassador, exempted by national law from amenability to all process, or of a consul, exempted by express treaty, was not before the court. "If an exception exists," says the chief justice, "to the general principle that all persons may be compelled to testify for the accused, it must be looked for in the law of evidence." Such an exception does exist in that law in favor of the king; but not, he decides, in favor of the president. If, (569) however, by treaty stipulation, which is the supreme law, an exception exists in the case of an agent of a foreign government, expressly placing him beyond the reach of compulsory process, the chief justice nowhere intimates that in such a case the process could issue.

It is urged that if this exemption by treaty is recognized, whole classes of residents might be in like maner placed beyond the reach of the process, and the accused might be deprived in many cases of all means of making his defence.

But it is admitted that, if the testimony of the witness cannot be received, or if from infamy or other reasons he is incompetent to testify, compulsory process cannot issue. The same evil apprehended in the hypothetical case, just mentioned, would arise were congress to declare a class of residents incompetent to testify; and that they have the power to do so as far as relates to proceedings in the federal courts is undeniable. But it seems to me that the accused cannot justly complain of any hardship. He has allowed to him compulsory process to obtain the attendance of all persons within the jurisdiction, and amenable to the process of the court. If any person whose attendance he desires is not subject to the process of the court, and *quoad hoc*, out of the jurisdiction, the accused is in the same position as if his witness had left the country, or were dead, or if, when placed on the stand, he had availed himself of his privilege of not criminating himself, or other similar right, and thus withheld testimony of importance.

On a careful consideration of the whole subject, I have come to the conclusion that this court has no power to issue process to compel the attendance of the consul of France in this case. But, on another

ground, it is clear to me that this court ought not to compel obedience to the subpœna in this case. The writ issued was a subpœna *duces tecum*, commanding M. Dillon to produce in court a certain document, said to be in his possession.

It has not been disputed that the right of the accused under the constitution, to obtain a subpœna *duces tecum* rests on the same ground as his right to process to compel the attendance of witnesses to testify orally in his favor. The (570) very letter of the constitution embraces, it is true, only the latter case, but it is declared by Mr. Chief Justice Marshall (Burr's Trial, p. 183), "that the constitutional and legal right of an accused to obtain process to compel the attendance of his witnesses, extends to their bringing with them such papers as may be material for the defense." "The literal distinction," observes the chief justice, "which exists between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation."

But in determining, in the first instance, whether the subpœna to produce the required document shall issue, or, as in this case, the subpœna having issued, in deciding whether the witness shall be compelled to produce it, the court is required to exercise a discretion. "Not," says Mr. Chief Justice Marshall, "that an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material, but in order to see that the papers in question are relevant to the case, and such as could be introduced into the defence."

It was for these reasons that the court, on the argument, required the defendant to disclose by affidavit the nature of the document he sought to have produced. That affidavit the counsel for the defendant have declined to furnish. The court is therefore wholly uninformed whether the document is such as could be received in evidence if produced, or whether it is of such a character as that the court ought to compel its production. If the document be wholly irrelevant or inadmissible in testimony, it is clear, from the observations of Mr. Chief Justice Marshall, that the court will not compel its production. And if, as there is reason to suppose, it is one of the official documents of the French consulate, by the very terms of the treaty its production cannot be compelled.

From the tenor of Mr. Chief Justice Marshall's observations on Burr's trial, it is apparent that the right of the accused to compel the production of a document, is not co-extensive with his right to compel the attendance of a witness to testify orally. In considering the nature of the discretion the court will exercise in awarding a subpœna (571) *duces tecum*, he observes: "If it be apparent that for state rea-

sons the papers cannot be introduced into the defence,the subpœna will not issue." And he afterward says, "that there may be matter, the production of which the court will not require, is certain." It seems, then, from the observations of the chief justice, that though a subpœna may go even to the president of the United States, to obtain his testimony, the accused does not enjoy a co-extensive right to obtain the production of any paper he may require for his defence. Whatever hardship to the accused this rule may occasionally work, the evil does not seem greater than arises in ordinary cases where a witness on the stand is excused for special reasons from testifying the facts within his knowledge, no matter how important to the prisoner the evidence of those facts may be.

By the third article of the consular convention between the United States and France, it is stipulated that the authorities shall in no case examine or seize the papers deposited in consular offices. If a court can compel their production, it is obvious that the protection intended to be given, is gone. If, then, the court will not require the production of papers which, for state reasons, ought not to be produced, it would seem that in a case like the present, an indictment for a misdemeanor, it will not, even if it has the power, violate the immunity and disregard the privileges secured by treaty to the agents of a foreign government.

In a capital case, that the accused ought, in some form, says Mr. Chief Justice Marshall, to have the benefit of papers which the court will not require the production of, is a position which the court would very reluctantly deny. What ought to be done under such circumstances, presents, he observes, a delicate question. But he does not intimate that in a case of misdemeanor, papers which by the supreme law cannot be seized or examined, shall be required to be produced. The most obvious course in such a case, is to admit secondary evidence of their contents. If the accused is unable to furnish such evidence, he is in no worse position than the ordinary case where accident or misfortune has put out of his reach material testimony.

(572) I think it clear, therefore, that in a case like the present, where the party subpœnaed is the consul of France, who is required to produce a document in his possession, it is not only the right, but the duty of the court to require the defendant to show that the document is not an official paper protected by law from examination and seizure. And that on the failure of the accused to furnish the required information, the subpœna *duces tecum* will not be allowed; or if issued, will not be enforced.

I therefore think that, on this ground alone, compulsory process ought to be refused.

DIVINA PASTORA, THE, (1819, U. S.—Spain)
4 Wheat. 52.
Marshall, Supreme Court.

(55) (Extract) The replication of the Spanish consul states, that inasmuch as the said Utley, in his plea, admits that **(56)** the said vessel, and the cargo laden on board, were, on the 31st day of October, 1816, the property of a subject or subjects of his majesty Ferdinand VII., the said consul claims the same, as the property of such subject or subjects, the names of whom are to him, at present, unknown; excepting that he verily believes the same to be the lawful property of Antonio Seris, as he, in his petition, hath set forth. And avers that the same ought to be retsored and delivered up for the use of the Spanish owner or owners.

DREE GEBROEDERS, THE, v. VANDYK, (1802, U. S.)
4 Rob., C. 232.
Sir William Scott, High Court of Admiralty.

SIR W. SCOTT (Extract) His affidavit states, "That he was requested by the president of the United States to take the command of an armed ship against the French; but on declining that offer, he was persuaded to accept the office of consul general for Scotland." In this capacity he says, "he has not acted farther than to appoint deputies." Whether there are any deputies now acting under his appointment, does not appear. If so, it would be a strong circumstance to affect him with a British residence, as long as there are persons acting in an official station here, and deriving their authority from him.

DUFOUR, SUCCESSION OF, (1855, U. S.—France)
10 La. Am. 391.
Slidell, Supreme Court of Louisiana.

(Extract) The French consul in New Orleans founds his right to intervene in this case, upon the 4th article of the consular convention between his majesty, the emperor of the French and the president of the United States, dated Washington city, the 23d of Feb., 1853.

He relies on the 7th article of said convention, to repel the attempt of the treasurer of the state of Louisiana to burden the French heirs of successions residing in France with the tax of ten per cent. imposed by the 4th section of the act of the legislature of 1842, entitled: An act to increase the revenue of the state, on all sums, or the value

of all property, which may accrue to foreign heirs in successions opened in this state.

[Court decided in favor of consul.—ED.]

DUMAS, INTERDICTION OF JOSEPH, (1880, U. S.)
32 La. Ann. 679.
Bermudez, Supreme Court of Louisiana.

(969) (Extract) IV. Besides: the service of that informal and illegal citation was made by the U. S. consul in Paris, on the defendant. We know of no law, federal or state, which vests national representatives with the power of serving judicial process of state courts on parties within their sphere of representative action. We have, nevertheless, requested counsel to inform us on the subject, but they have failed to do so. It canot be conceived that the general government sends representatives abroad for the purpose of acting as the executive officers of the different state courts in the union. It is true that those representatives sometimes act as the ministerial officers of such courts, as, for instance, to execute commissions to procure testimony, and the like; but they do so with the special authority of state legislation, providing distinctly for such cases. The inference, therefore, is, that, even if the citation could have issued and was valid, the service of it did not take place by the instrumentality of one authorized by law to make it.

DURAND v. HALBACH, (1835, U. S.)
1 Miles 46.
Pettit, District Court of Philadelphia.

(Extract) The privilege, as a national one, however, could not be waived by a consul's omitting to plead it, or by his withholding the suggestion of it till after judgment.

* * * * * * * * *

The history of the case (Davis v. Packard) is somewhat remarkable, but it is sufficient for our present purpose to state, that after the record had been twice carried up to the supreme court of the United States, it was found that the only mode of giving the defendant relief, was to send him back to the supreme court of New York, that he might by suing out and prosecuting a writ of error *coram nobis,* establish the fact of his consulship, and obtain in that court a reversal of their own judgment.

Whether the proper exhibition of the proof of foreign consulship, as to one defendant, will avail the other, is a question upon which no

opinion is intimated. The court will consider that point, should it be presented.

The remedy just pointed out being, in the opinion of the court the true one, the defendant's consul takes nothing by his present motion.

EADY, IN RE, (1838, Great Britain)
6 D. P. C. 615.
Tindal, Common Pleas.

Merewether, Serjt. moved that the acknowledgement of the applicant, who was a married woman, might be **(616)** taken, under the fines and recoveries act, (3 & 4 Will. 4, c. 74.) The applicant was a resident at Hamburgh, and the affidavit of verification of the certificate of acknowledgement was made before the British consul there. On the papers being produced to the officer of the court, he refused to take them because they were not sworn before the proper officer. It was deposed, however, that the consul was the only person in Hamburgh, who would or could swear the affidavit: and it was submitted that the court would deal with the application as the necessity of the case required.

PARK, J.—There may be a question whether it would be a legal conveyance of the property, if the affidavit is not properly sworn.

Merewether submitted that it was only for the court to be satisfied, and that the allegation that the consul was the only person who would swear it, should be deemed sufficient.

TINDALL, C. J.—You had better renew the application with fresh affidavits, and let there be some one who has applied to the courts, who has got a direct and distinct refusal to swear the affidavits. Let it be some native authority, and let the authority be certified by the consul.

On a subsequent day in term,

Wilde, Serjt., renewed the application, and produced affidavits, in which it was sworn, that an agent had been sent to Hamburgh, with proper instructions, and he had procured an affidavit of verification to be sworn before a judge of one of the native courts. The affidavit was in German, but there was a translation of it into English, which was verified by a notary, and the oath had been administered in German, but was interpreted to the deponent in English. The signature of the deponent, how- **(617)** ever, was not attached to

the affidavit, it being contrary to the practice of the courts in Hamburgh, that any signature should be attached to an affidavit, except that of the judge before whom the oath was administered. The signature of the judge was here appended to the document, and it was verified by a notary. It was besides sworn, that the court refused to swear the affidavit in the English language, and that there was no person in Hamburgh authorized to swear such an affidavit, except the English consul, and the affidavit sworn before him, and which had before been produced, was now in court.

TINDAL, C. J.—There is no objection to the oath having been administered in German and interpreted; the same rule of practice is adopted here. The only thing wanted is an affidavit to state that it is the law of Germany, that the deponent is not allowed to sign his affidavit.

Wilde submitted, that the signature of the judge being appended to the affidavit was a sufficient guarantee of the course always pursued.

TINDAL, C. J.—I think the clerk had better swear that he believes the course which has been adopted, is that which is regularly taken in Germany. To the eye of a person merely looking at the affidavits, the evidence would otherwise appear incomplete.

Rule accordingly.

ELIZABETH, THE, (1862, U. S.—Great Britain)
1 Blatchf. Prize Cases 250; Fed. Cases 4,350.
Betts, District Court.

(Extract) [Acting British consul filed a claim, to which was subjoined] his own test oath to such ownership, his knowledge, as stated by him, being acquired "from his position as present acting consul in the port of New York, and from conversation with the master and crew of the above steamer Elizabeth."

ELWIN KREPLIN, THE, (1870, U. S.—Germany)
Fed. Cases 4,427.
Benedict, District Court.

[Opinion reserved in the circuit court. See (The) Elwine Kreplin, Fed. Cases 4, 426.

A very able discussion of consular jurisdiction over seamen.

Judge Benedict's decision seems more in harmony with our jurisprudence than that of the higher court.

Also discusses right of treaty making power to curtail jurisdictions of the courts.——ED.].

ELWINE KREPLIN, THE, (1872, U. S.—Germany)
9 Blatchf. 438; Fed. Cases 4,426.
Woodruff, Circuit Court.

[Reverses the decision of the district court in the Elwin Kreplin, Fed. Cases 4, 427. Supreme court refuses to issue a mandamus to compel the circuit court to pass upon the merits. See (ex parte) Newman. In this case court declared that it had no jurisdiction over a dispute regarding wages against the protest of the consul who is given jurisdiction by treaty.—ED.]

EUDORA,[1] THE, (1901, U. S.—Great Britain)
110 Fed. Rep. 430.
McPherson, District Court.

In Admiralty. Suit by seamen to recover wages.

J. B. McPHERSON, District Judge. The parties to this suit have agreed upon the following facts:

"It is stipulated that at the argument of the above case the following facts shall be admitted with the same effect as if proved by depositions taken in accordance with the provisions of the revised statutes or the rules of this court:

"(1) That the bark Eudora at the time hereinafter mentioned was a British vessel duly registered under the laws of Great Britain, and hailing from the port of Halifax, Nova Scotia.

"(2) That on January 22, 1900, the said bark was in the port of New York, and, being about to proceed to sea, B. M. Patterson, Edward Jansen, Sven Freeman, E. Thompson, Simon Anderson, and Carl Stevenson, the libelants, one or more of whom were American citizens, shipped as seamen thereon, (431) signing the written shipping articles required by the British law, for 'a voyage from Portland, Maine, to Rio, and for any ports or places within the limits of 65 degrees north and 70 degrees south latitude, trading to and fro as required, not to exceed twelve calendar months, final port of discharge to be in the United States of America or Canada,' at the rate of 'one shilling for 45 days, and twenty dollars per month thereafter.'

"(3) That at the time said shipping articles were signed the sum of twenty dollars was paid on account of each of the libelants, and with the consent of each of them, to the shipping agent through whom they had been employed by the master of said bark. Said payments were made on account of indebtedness due by the said libelants to the shipping agent for board and for goods sold to them by him.

"(4) That, as required by the laws of Great Britain, the said seamen were

[1] Reversed in Patterson v. The Eudora, 190 U. S. 169.

engaged in the presence of the British vice consul at the port of New York, and said contract was made with his sanction.

"(5) That thereafter said vessel proceeded upon a voyage to Turk's Island, and thence to Philadelphia, when and where said voyage was completed and the said libelants were discharged; that during the whole time the libelants were in the service of said vessel they performed their duties as seamen; that at the time of the arrival of said ship at Philadelphia, and at the time they were discharged, no wages were due to the libelants by the terms of the contract contained in said shipping articles.

"(6) That the libelants each claim to recover the sum of $26.66 2-3, being wages at the rate of $20 per month from the time of shipment on January 22, 1900, until the date of their discharge on March 3, 1900.

"(7) That Karl Svenson, one of the libelants, designated in the libel as Carl Stevenson, has signed the shipping articles at the British consulate, in Philadelphia, acknowledging the recipt of all wages due him for said voyage, and freeing the bark from all liability therefor.

"(8) That proof of the law of Great Britain is waived, and it is agreed that the law thereof as contained in the printed reports, statutes, and text-books shall be received with the same effect as if regularly proved, subject, however, to the right of the libelants to object upon any other ground than the mere formality of proof.

"(9) The contract specified in said shipping articles, and the payment of said sum of twenty dollars to the said shipping agent, were not contrary to or prohibited by the laws of Great Britain; but it is admitted, for the purposes of this case, that said payment is contrary to the act of congress of December 21, 1898, if that act is properly applicable to the contract in this case."

The purpose of the suit is to obtain a decision upon the scope of section 24 of the act of December 21, 1898 (30 Stat. 763), which forbids the payment of a seaman's wages in advance to himself or to any other person, and especially to obtain a decision upon the scope of clause "f" of that section, which declares "that this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee or agent of any foreign vessel, who has violated its provisions, shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation, provided that treaties in force between the United States and foreign nations do not conflict."

There is no formal treaty between Great Britain and the United States upon this subject, and the question must be determined by the application of general legal principles. In my opinoin, the suit cannot be maintained, for at least two of the reasons urged at the argument by counsel for the ship, namely: First, because the act of 1898 does not apply to the libelants; and, second, because it is (432) not within the power of congress to regulate the internal affairs of a vessel sailing under a foreign flag. I regard both these propositions as established by the supreme court of the United States in Ross v.

McIntyre, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, and for that reason I shall not discuss them. It is enough, I think, merely to say in support of the first proposition that the act of 1898 does not apply to the libelants, because the statute, as its title declares, is intended to "amend the laws relating to American seaman, for the protection of such seamen, and promote commerce;" and it cannot, therefore, apply to seamen, even if they are American by birth or naturalization, that have regularly shipped upon a British vessel, and have thereby become British seamen for the time being. In support of the second proposition, it may be added that a foreign vessel is a part of the territory of the country to which she belongs, and that congress has no inherent power to control or prescribe rules for her domestic affairs, such as the terms upon which she ships her crew, or the wages she agrees to pay. In certain respects, a foreign ship in our ports is , no doubt, subject to the laws of the United States; but the government and payment and treatment of the crew are matters that are properly held to concern the ship and the crew alone, subject to the law of the flag.

The libel must be dismissed, but without costs.

EVANGELISTRIA, THE, (1876, Great Britain—Greece)
2 P. D. 241; 46 L. J., Adm. 1.
Sir Robert Phillimore, High Court of Admiralty.

[Court accepts jurisdiction at instance of Greek consul when ship and all parties are Greek.

Consul also asks court to execute decree of Greek court.—ED.]

FALCON, THE, (1805, Great Britain—U. S.)
6 Rob., C. 194.
Sir William Scott, High Court of Admiralty.

(197) (Extract) He is, it seems invested with the character of the American consul at Bourdeaux; and certain it is, that an American consul resident in France is subject to all the disabilities of a French merchant, as to the power of becoming a claimant in this court;

FALLS OF KELTIE, THE, (1902, U. S.)
114 Fed. Rep. 357.
Hanford, District Court.

[U. S. courts cannot refuse jurisdiction in a case where the libellant is an American citizen—will also determine the case of co-

libellants—treaty making power no right to take away citizen's appeal to courts of U. S.—treaty only applies to alien seamen as is shown by statute regarding remission of deserters.—ED.]

FAREZ, IN RE FRANÇOIS, (1870, U. S.—Switzerland)
7 Blatchford 345.
Blatchford, Circuit Court.

[Complaint in extradition case verified by foreign consul sufficient if made officially although not based on personal knowledge.—ED.]

(Extract) The prisoner had the right to call the Swiss consul, who was the complainant, as a witness, and examine him at any stage of the case, but he could not properly claim the right to cross-examine him before any other evidence was offered, when it appeared on the face of the complaint that the consul did not pretend to have any personal knowledge of the matters stated in the complaint.

FARMER, SUCCESSION OF, (1862, U. S.)
1 Rob. 270; Hennen's La. Dig. Ed. 1861, p. 582.
Garland, Supreme Court of Louisiana.

(Extract) The case is in every material feature similar to that of the executors of Alexander Wedderburn, ante. p. 263, which has been just now decided, and we have come to the same conclusion in relation to it.

FATTOSINI, MATTER OF, (1900, U. S.—Italy)
67 N. Y. Supp. 1119; 33 Misc. 18.
Silkman, Surrogate Court, New York.

(1120) SILKMAN, S. This is an application upon the petition of Giovanni Branchi, consul general of Italy, for the issuance of letters of administration to him upon the estate of the above-named decedent, an Italian subject, who died and left property within the county of Westchester. The petition alleges that the decedent left, him surviving, a widow and two minor children, his only next of kin, all residing at Castelletto, Verona, Italy. In the absence of creditors, under the state statute the administration should go to the county treasurer, but the question is presented whether or not the treaty between the United States and Italy supersedes the state law, and whether or not the treaty authorizes and empowers the consul general to administer upon the estates of Italian subjects dying within the jurisdiction of his consulate. The rights of the consul general of

Italy were under consideration in this court and discussed in Re Tartaglio's Estate, 12 Misc. Rep. 245, 33 N. Y. Supp. 1121, and it was there held that the distributive shares in the estate of an Italian subject belonging to next of kin resident in Italy were payable to the consul general, and a decree was made directing the county treasurer, with whom the distributive shares had been deposited, to make such payment. There can be no question that state statutes must give way, in so far as they are not in accord with the obligations of the federal government under its treaties with foreign nations; and they must be construed, and the procedure of local courts must be made to conform, as nearly as practicable, to the treaty obligations of the federal government. Treaty provisions are to be construed with much more liberality than legislative enactments. Terms and words used in the former are to be given the broadest meaning in order to effectuate the liberal intentions of the high contracting parties. Due regard must be had to difference in languages, nice (1121) distinctions must be avoided, and the great purpose of convenient international intercourse must be borne in mind. It has been said that a foreign consul, without specific authority, has the general right to protect the rights and property of a person of his nation within the jurisdiction of his consulate (The Bello Corrunes, 6 Wheat. 168, 5 L. Ed. 229), and that foreign consuls have power to administer upon the estates of their fellow subjects deceased within their territorial consulate. Wheat. Int. Law (2d Ed.) 151, and Wools. Int. Law, § 96. While there may be this inherent power, a fair construction of the treaty with Italy gives to the consul general specifically the power claimed. Article 22 of the commercial treaty of 1871 provides that:

"The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by a sale, donation, testament or otherwise, and the representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases."

Articles 9, 16, and 17 of the consular treaty of 1878 provide:

"Art. 9. Consuls general, consuls, vice-consuls, and consular agents may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive, for the purpose of complaining of any infraction of the treaties or conventions existing between the United States and Italy, as also in order to defend the rights and interests of their countrymen."

"Art. 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir or testamentary executor designated by him, the competent local authorities shall give notice of

the fact to the consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Art. 17. The respective consuls general, consuls, vice-consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation."

This provision giving to the Italian consuls general all the rights, prerogatives, and privileges of officers of the same grade of other more favored nations means more favored in respect of the particular matter in regard to which a question may arise, and is not to be made applicable only in cases where a treaty, taken as a whole, is more favorable. Now, upon examining the treaties of the United States with foreign nations, we find the treaty of July 27, 1853, with the Argentine republic, and in that this provision:

"Art. 9. If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." (1122)

Considering carefully the language of this treaty, the Argentine republic would seem to be treated more liberally, and with more favor, and given greater specific rights, than the kingdom of Italy under its treaties. Therefore it follows that under this "most favored nation" clause we must give to the consul general of Italy the same powers and rights conferred upon the consul general of the Argentine republic. This leads to the conclusion that not only by inherent right, but by specific treaty provision, the consul general of Italy is entitled to administer in this case, and is preferred to the persons entitled under the state statutes. This administration, however, must be had as provided in the treaty of the Argentine republic, "conformably with the laws of the country for the benefit of creditors and legal heirs." While it probably is true that under inherent power, as well as under specific treaty provisions, a consul general could demand, sue for, and collect the assets of countrymen dying within his jurisdiction without the aid of the machinery of the surrogate's court, nevertheless, under article 9 of the Italian consular treaty, above cited, he has the right to come into the surrogate's court to defend his countrymen; and, having done so, he is entitled to our aid as contemplated by the treaty.

We are next brought to the question of security. While it is policy to give treaties the broadest and most liberal construction, and to extend to foreign subjects, through their respective representatives, all the facilities accorded to citizens, at the same time it cannot be argued that the United States intended to deprive any of its citizens of rights accorded to them under their local laws. That is to say, it cannot be said that the federal government intends to take away from citizens or resident creditors of a deceased alien the security which is provided for under state laws; and, therefore, the administration to be granted to the consul general can only be upon giving the bond provided for by state law, the penalty, however, to be double the amount of the debts due to resident creditors, or double the amount of the assets, in case the estate be insolvent. Upon satisfactory evidence, however, that the decedent here died without debts due resident creditors, letters of administration will issue without the giving of a bond.

Letters of administration granted.

FAWCUS, IN THE GOODS OF, (1884, Great Britain)
Law Rep. 9 Prob. Div. 241.
Hannen, Probate Division.

Where by German law a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge.

HENRY FAWCUS, late of Hamburg, in Germany, deceased, died on the 11th of November, 1883, at Hamburg aforesaid. The deceased, who was a German subject, died domiciled in Germany, having made his will whereby he disposed of, amongst other property, a policy of assurance effected in the Commercial Union Life Assurance Company, of Cornhill, London.

An English probate being therefore necessary, the ordinary English oath and affidavit for inland revenue were sent to the executors (both of whom were Germans resident in Hamburg) to be sworn before the British consul, but he refused to administer the oaths on the ground that he had received instructions from the British ambassador in Germany not to administer an oath to any but British subjects.

The oath and affidavit were then sworn before the judge of the Hamburg Probate Court, and signed by the judge and clerk of the court, and sealed with the court's seal, and the signatures of the judge and clerk were verified by the British consul, who also certified as to the seal of the court. It having been doubted at the registry whether the oath and affidavit were duly sworn;

Aug. 4. *Channell,* moved the Court to admit them. As the consul is not allowed by German law to administer the oath, this is in effect a place where there is no such person (21 & 22 Vict. c. 95, s. 31.) [1]

Curia advisare vult.

(242) Aug. 9. SIR J. HANNEN (President.) An affidavit had been sworn before some competent officer at Hamburg—that is to say, competent officer in the absence of the British consul, and the reason why it was not sworn before the British consul was that the German government asserts that by the law of Germany no judicial act, including the swearing of an affidavit, can be done before anybody but the German authority. Our government, I believe, has acquiesced in that view, and has given instructions to British consuls not to administer oaths in such matters. In these circumstances the question was whether the condition mentioned in the Act of Parliament, that in the absence of a British consul the affidavit might be sworn before another competent authority is fulfilled, and I am of the opinion that it is. If the consul were accidentally absent that affidavit might be sworn—as it has been—but if he is forbidden both by the law of the country in which he lives and by his superior, the foreign office, to do this act, it appears to me that he is not available, and that the affidavit may be sworn before the German authorities. I therefore admit the affidavit.

Solicitors: Leonard & Leonard.

R. A. P.

FERRERS v. BOSEL, (1821, U. S.)
10 M. 35.
Martin, Supreme Court of Louisiana.

(Extract) The only question in the case is, as to the admission in evidence of notarial instruments, executed at Bagur, in the kingdom of Spain.

The signature of Jose Puig y Pui, the notary before whom these instruments were executed, as well as his official capacity, are proven by the signature and *signos* of three notaries of the district; by that of the constitutional alcade, at Bagur, and also by the American consul at Barcelona, who has also certified that of the alcade.

[1] The following are the material parts of the section referred to. In cases where it is necessary to obtain affidavits...from persons residing in foreign parts out of her majesty's dominions the same may be sworn...before the persons empowered to administer oaths under the act 6 Geo. 4, c. 87, or under the act 18 & 19 Vict. c. 42. Provided that in places where there are no such persons as are mentioned in the said acts, such affidavits...may be made...before any foreign local magistrate or other person having authority to administer an oath.

The authenticity given by Spanish officers, to these instruments, would give them credit in the tribunals of Spain; and I think, when the signature and seal of the American consul are added to the proof of the hand writing of the notaries, they ought to be received in this.

FERRIE v. THE PUBLIC ADMINISTRATOR, (1855, U. S.—France)
3 Bradford's Surrogate Reports 249.
Bradford, Surrogate's Court of New York.

(264) (Extract) 5. That the next kin, in case of Ferrie's illegitimacy, are entitled, is therefore clear, and although from being non-resident aliens, they are disqualified from administering, that disqualification may be removed by a change of residence to New York, and in default of their administering, the public administrator in this county is entitled to letters before creditors and strangers. Their alienage, however it affects the mere suggestion of administration, affords no reason for disregarding their claims as to the property. In that respect their standing here is not a matter of comity, but of strict right, and there is no tribunal in any civilized country, I hope, where their rights would not be respected. I must therefore remain of the same opinion, as expressed on the former hearing of this case, and direct a commission to be issued as already determined. That commission must issue, however, in the ordinary form, and should be under the supervision of a person appointed by this court. The commission rogatoire, invoking the aid of foreign tribunals, in the form suggested by the consul for the French claimants, presents no advantages, and is exposed to the objection that it removes the investigation from the control of this court, and from the operation of (265) those rules of evidence which prevail in American tribunals.

The objection made to the right of the French consul to be heard in this case seems to me not well founded. Our treaty with France secures to the consuls of both nations the right to apply "to the authorities of their respective governments, whether federal or local, judicial or executive"..."for the purpose of protecting, informally, the rights and interests of their countrymen, especially in cases of absence." This treaty is a formal recognition of a practice established by national comity. Neither the treaty nor the usage gives the consul any status in the court as a party. He appears only "informally," having a right to be heard not as a party, but as the national agent of parties supposed to be interested.

FLAD OYEN, THE, (1799, Great Britain)
1 Rob. C. 135.
Sir William Scott, High Court of Admiralty.

[Consular condemnations of prizes in neutral ports are not valid.—Ed.]

FLYNN v. STOUGHTON, (1848, U. S.)
5 Barb. 115.
Edmonds, Supreme Court New York.

EDMONDS, J. The defendant, after having pleaded to the merits, and after a verdict has been rendered against him, seeks to avoid the jurisdiction of this court on a special motion and on a suggestion contained in affidavits, which do not form any part of the record. In Davis v. Packard, (6 Wend. 333,) our court of errors say, if the court has general jurisdiction over the subject matter, and the defendant has some privilege which exempts him from the jurisdiction, he may waive that privilege if he chooses to do so, and in a superior court of general juris- (116) diction, if he neglects to object and show to the court his particular exemption, by way of a plea in abatement or otherwise, before he has answered as to the merits, he will forever be precluded. By pleading in chief, and thereby calling for a decision of the cause on the merits, the party admits the jurisdiction of the court to make such decision. And in the same case (10 Wend. 50,) that court again affirm that doctrine and insist that if the privilege of a public minister is that of his sovereign and therefore cannot be waived, it is confined to ambassadors or other diplomatic agents, and does not apply to consuls or commercial agents.

The supreme court of the United States, in revising the judgment of the court of errors in that case, did no more than assert that jurisdiction over foreign consuls was vested solely in the federal judiciary by the act of congress. (7 Peters, 276. 8 Id. 324.) That court does not touch the principle established in our state tribunal of last resort, to which I have already referred. It is therefore left in full force for my governance. Consequently I must hold that the privilege of a foreign consul to be exempt from the jurisdiction of state tribunals, must be asserted in due time, and may be waived by a plea to the merits. The motion to quash the proceedings must therefore be denied; but the inquest must be opened, because it was irregular for the plaintiff to put his cause on the calendar after the term had begun, without notice to his adversary. The defendant searched the calendar after the sittings began, and not finding this cause upon it had a right to suppose it would not be called on. To put it upon the calendar after that, and proceed to judgment without

notice to him, was an irregularity on the part of the plaintiff for which the verdict must be set aside.

FOEL v. THE SALOMONI, see The Solomoni.

FOSTER v. DAVIS, (1822, U. S.—Italy)
1 Litt. 71.
Per Curiam, Court of Appeals, Kentucky.

1. Where a man enters into a covenant to transact business in a foreign country, a notarial certificate of his being a citizen of the United States, &c. such as is usually obtained by persons going abroad, is not evidence for him of his having made preparations for leaving the United States. 1.

2. A passport, made out by a consul of the United States, residing in a foreign country, permitting such person to return from that country to the United States, is not evidence that he has been in such foreign country. 1.

3. Facts of the above character are completely susceptible of proof by witnesses; and as a consul is not a judicial officer, there is no reason for substituting his certificate in lieu of depositions, for the proof of them. 2.

Opinion of the Court: This was an action of covenant, upon articles of agreement between the plaintiff and the defendant, whereby, after reciting that James Schee, the American consul to Genoa in Italy, had undertaken to dispose of the defendant's patent Hemp and Flax Spinning Machine right, to certain states and territories in Europe, it was stipulated on the part of the plaintiff, that he would go with the said Schee, and conduct the business of (72) spinning and exhibiting the said machine; and the defendant, on his part, agreed, in consequence of the above services rendered by the plaintiff, to pay his passage and expenses going and returning to Kentucky, and pay him at the rate of thirty-three and a third dollars per month, while he might be employed in such services, and while he was going and returning from Philadelphia, until he returns to Kentucky, except what time he should choose to tarry on his way, on his own account. The plaintiff, after setting forth the agreement in his declaration, alleges a performance of the services undertaken by him to be performed, and assigns as a breech of covenant on the part of the defendant, his failure to pay the plaintiff's passage and expenses, and the price stipulated for his services. The defendant filed two pleas, one of which was held bad on demurrer; but as the assignment of error does not question the correctness of the decision of the court on the demurrer, the plea need not be recited. By his other plea, the defendant denied that the plaintiff had performed the services by him undertaken to be performed; and to that plea the plaintiff joined issue to the contrary. On the trial of the issue, the plaintiff offered to

read in evidence a paper under the seal and signature of a notary public at Philadelphia, stating that the plaintiff was a native citizen of the United States of America, and requesting all governments, princes, potentates and powers, to suffer him to pass without molestation, etc. To the reading of this paper, the defendant objected; but the court overruled the objection, and suffered it to be read, to show that the plaintiff had taken the preparatory steps for leaving the United States. The plaintiff then offered in evidence a paper signed by James Schee, the consul of the United States at Genoa, with the consular seal thereto attached, and written in a foreign language. To the admission of this paper as evidence, the defendant also objected; but the court overruled the objection, and permitted it to be used without being read; for there was no person in court who could translate it accurately, though the court understood its purport, sufficiently to know that it was a passport from our consul at Genoa, to the plaintiff, to return to the United States, and so explained it to the jury, and (73) directed the jury that the paper was only to be evidence of the plaintiff's having been at Genoa, and the time of his residence there, and not for any other purpose. To the opinions of the court, in admitting those papers as evidence, the defendant excepted; and a verdict and judgment having been rendered against him, he has appealed to this court.

1. We cannot accord with the circuit court in the propriety of admitting either of those papers as evidence. They are both pretty much of the same character, and being liable to like objections, may well be considered together. They, no doubt, according to the usages of nations, were sufficient to entitle the bearer to that courtesy and respect which are due to a citizen of the United States from foreign governments, through whose states or territories he might pass. It was for that purpose alone they were given, and for no other purpose can they be legitimately used. They certainly cannot, we think, be used as evidence in a court of justice, for the purpose of proving facts, of the character they were admitted to prove in this case.

2. These facts, from their nature, were susceptible of being established by the testimony of witnesses, upon oath; and it is a settled rule, that for the establishment of facts of this sort, the sanction of an oath is indispensable; and, of course, the *ex parte* statement or certificate of any one, not upon oath, whatever may be his character or station, cannot be admitted as evidence of the truth of such facts. A consul, by the law of nations, is, no doubt, possessed of high and extensive powers; but he is not, properly speaking, a judicial officer; and it is accordingly held, that his certificate is not only not entitled to

the character of a judgment, but that it ought not to be admitted as evidence of the fact therein stated.—Phillips' E v. 287, 301.

The judgment must be reversed with costs, and the cause be remanded, for new proceedings to be had, not inconsistent with the foregoing opinion.

FRANÇOIS FAREZ, IN RE, see Farez, in re François.

FRANZ AND ELIZE, THE, (1861, Great Britain)
5 L. T. 290; 1 Lush. 377.
Dr. Lushington, High Court of Admiralty.

(Extract) But when a foreign seaman sues in this court for his wages, if the consul from his country objects to the proceedings, the court should have immediate notice of that fact, as usually it would not be disposed any longer to entertain the suit.

FROMENT v. DUCLOS, (1887, U. S.)
30 Fed. Rep. 385.
Brown, District Court.

(Syllabus) The act of congress of February 18, 1875, which amends Rev. St. U. S. § 711, by repealing the previous express exclusion of the state courts as to jurisdiction over suits against consuls, does not diminish the jurisdiction of the federal courts over the same actions.

[Prior to the act of 1875...this jurisdiction embraced all suits to which the consul or the vice-consul was a necessary co-defendant.]

FRY v. COOK, (1876, U. S.—Great Britain)
14 Fed. Rep. 424.
Billings, District Court.

(Extract) The representative of that country asks the court not to intervene.

[Consul protested against the courts taking jurisdiction in a libel for an offense committed on the high seas, and court refused to take jurisdiction.—ED.]

GARDNER v. BIBBINS, (1833, U. S.)
Blatchf. & H. 356; Fed. Cases 5,222.
Betts, District Court.

[Master called upon consul and secured soldiers to quell what he declared to be a mutiny. The libellant was awarded damages from the master for improper imprisonment.—ED.]

GENERAL McPHERSON, THE, (1900, U. S.—Germany)
100 Fed. Rep. 860.
Hanford, District Court.

(Extract) [Article 8 of treaty with Germany] does not constitute a German consul administrator of the estate of a deceased person. On the contrary, it only authorizes German consuls to act as legal representatives of the German emperor's subjects. Now Mr. Schultz ceased to be a subject of the emperor when he departed from this mundane sphere, and he has no rights for which the German consul need have a care, for his rights were terminated with his death. * * * * * * *

The case will be dismissed as to all the parties above mentioned, but, if prompt application is made, leave will be granted to the German consul to amend his pleading, and introduce further proof to identify the heirs of Charles Schultz.

GERNON v. COCHRAN, (1804, U. S.)
2 Phillim. (2d Ed.) 270; Bee 209, Fed. Cases 5,368.
Bee, District Court.

(Extract) By the French and Spanish consuls, who are general agents for the subjects of their respective countries, not otherwise represented * * * *.

[In this case the French and Spanish consuls could not agree about the validity of a capture and referred the case to their minister at Philadelphia—the ship to be sold and the proceeds awarded by the minister.

The court held that the letter of the French consul-general of France at Philadelphia to the French consul at Charleston saying that the capture had been decided to be illegal by the minister, was conclusive.—ED.]

GITTINGS v. CRAWFORD, (1838, U. S.)
Taney. 1; Fed. Cases 5,465.
Taney, Circuit Court.

In the second section of the 3d article of the constitution of the United States, it is declared that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction;" held, that this does not conflict with and render unconstitutional the act of congress passed 24th September 1789, sect. 9, giving jurisdiction to the district court of the United States, in civil cases, against consuls and vice-consuls.

The grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive.

A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides.

Circuit Court, April term, 1838. Error to the District Court.

TANEY, C. J. The suit in this case was brought by John S. Gittings against John Crawford, upon a promissory note (2) made by Crawford to Gittings, for $980, dated December 27, 1834, and payable twenty days after date. The writ stated the plaintiff to be a citizen of the state of Maryland, and the defendant to be the consul of his Britannic majesty. The defendant appeared to the suit, and moved to quash the writ, on the ground that the district court had no jurisdiction over the case; the court below sustained the motion, quashed the writ, and gave judgment in favor of the defendant for costs. The case has been brought here by the plaintiff, by writ of error, and the question to be now decided by this court is, whether the act of congress of September 24, 1879, § 9, giving jurisdiction to the district court of the United States, in cases of this description, against consuls and vice-consuls, is constitutional or not.

The clause of the constitution of the United States which is supposed to be violated by this law, is that part of the 2d section of the 3d article, which declares that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party , the supreme court shall have original jurisdiction." It is insisted, that the grant of original jurisdiction in these cases to the supreme court, means exclusive original jurisdiction, and that it is not in the power of congress to confer original jurisdiction, in the cases there mentioned, upon any other court.

The question thus presented for the decision of the circuit court, is certainly a difficult and embarrassed one. Different opinions have been expressed upon it by eminent men in high judicial stations; and the difficulties which arise from the words of the constitution itself have been greatly multiplied by the different constructions, which, at different time, have been given to the clause in question.

The earliest case upon the subject is in 2 Dall. 297, United States v. Ravara, in the year 1793. That was an indictment in the circuit court against a consul, for a misdemeanor; and the consul for the defendant moved to quash the indict- (3) ment, upon the ground that the clause of the constitution above quoted vested exclusive jurisdiction in such cases in the supreme court, and that the act of 1789, which conferred original jurisdiction on the circuit court, was unconstitutional and void. A majority of the court, however, overruled the objection, and decided that the grant of original jurisdiction to

the supreme court was not exclusive; that congress might vest original jurisdiction, in the cases there enumerated, in other courts, and that the act of 1789, conferring jurisdiction upon the circuit court, was constitutional and valid. At a subsequent term of the circuit court, in 1794, the case came up for trial, Chief Justice Jay presiding, and the court charged that the defendant was not privileged from prosecution in virtue of his consular appointment, and the jury, under that charge, found him guilty.

It appears, then, that in the circuit court, upon two different occasions, it was held, that the jurisdiction conferred by the constitution upon the supreme court, in cases affecting consuls, was not exclusive. And these decisions were made by eminent and distinguished judges, some of whom had been members of the Convention which framed the constitution, and all of whom had taken prominent and leading parts in the discussions which preceded its adoption by the people. These discussions have all the force and authority which courts have uniformly given to the contemporaneous construction of a law.

But the authority of the decisions in the circuit court was shaken by the case of Marbury v. Madison, 1 Cranch 137, where the question as to the construction of this clause of the constitution came, for the first time, before the supreme court. In the opinion delivered in that case, it was said, in general terms, by the court, that the original jurisdiction conferred on the supreme court was exclusive.

In Cohens v. State of Virginia, 6 Wheat. 378, the construction of this part of the constitution again came under consideration. And although the court reviewed and (4) recalled some of the dicta in the case of Marbury v. Madison, yet what had been there said on the point now in question, was not disturbed, and the court again strongly intimated that the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States.

And in Osborn v. United States Bank, 9 Wheat. 820, the chief justice distinctly expressed the opinion that the original jurisdiction granted to the supreme court, is exclusive, and cannot be given by congress to any other tribunal.

It is worthy of remark, that in two of these three cases in the supreme court, the question was upon the jurisdictions of that court, and not upon the jurisdiction of an inferior tribunal of the United States. And in the last of them, the question was upon the jurisdiction of the courts of the United States, as contradistinguished from the state courts; and the further question whether the case be-

fore them arose under a law of the United States. In neither of these three, was the point directly presented, whether congress could grant original jurisdiction to an inferior court, in the cases enumerated in the clause now in controversy. All therefore that was said by the court in these cases, on that question, was by way of argument and illustration, and not necessarily involved in the decision of the cases then before the court. And we are warned by the chief justice, in the opinion delivered by him in Cohens v. Virginia, that principles thus stated are not to be regarded as binding adjudications; and some of the principles strongly put forth by him in the case of Marbury v. Madison, are repudiated and overruled in Cohens v. Virginia.

Yet, after these repeated declarations of the opinion of the supreme court, so explicitly reiterated in the case of Osborn v. United States Bank, I should not have felt myself at liberty to adopt a different construction of the article in question, if the action of the supreme court on this subject had stopped with the last mentioned case; (5) for the controversy involves no right reserved to the states or secured to individual citizens. It is a question merely of the distribution of power among the courts of the United States, and when the supreme court had so repeatedly expressed its opinion that that court, under the constitution, had exclusive original jurisdiction over the subject-matters enumerated in the clause now under consideration, it would hardly have been proper or decorous in the circuit court to disregard those opinions, although they were expressed when the point in controversy was not directly before it.

But the action of the supreme court did not stop with the cases above cited; the point in dispute was brought directly before the court in United States v. Ortega, 11 Wheat. 467. That case came before the supreme court upon a certificate of division of the judges of the circuit court, and the points presented by the certificates were— 1. Whether it was a case affecting an ambassador or public minister; and— 2. If it were such a case, was the act of 1789, giving original jurisdiction to the circuit court, constitutional or not? The court said it was not necessary to decide the second point, because they were of opinion that it was not a case affecting an ambassador or public minister. It can hardly be supposed, that the supreme court would have refused to express an opinion on the second point, if they had regarded the question as settled by the previous decisions of that court. The manner in which they treated it, when thus directly brought into discussion, shows that in their opinion, it was still an open one, and had not been concluded by anything said in the different opinions of the court to which I have before referred; and

the reporter in a note to this case expressly states that the point in question had not been decided by the supreme court.

But in another and very late case the court have, in my judgment, distinctly affirmed the constitutionality of the act of 1789, on the very point in controversy. In the case of Davis v. Packard, 7 Peters 281, the question was brought (6) before the court by writ of error from the court of errors of New York, which court was supposed to have decided that a state court had jurisdiction in cases where a consul was concerned. It turned out afterwards, that the court had not so decided; but the supreme court, when the case came before them, interpreted the record otherwise, and, acting upon that interpretation, reviewed the judgment of the court of errors of New York. Judge Thompson, in delivering the judgment of the supreme court, says: "As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789, sect. 9, (1 Stat. 76) gives to the district courts of the United States, exclusively of the courts of several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offenses mentioned in the act." This language used by the court, with the point directly before them, can only be understood as an affirmance of the constitutionality of the act of 1789; for the exclusion of the state courts is not put upon the ground, that they were impliedly excluded by the grant of original jurisdiction in such cases to the supreme court; but the decision is placed on the grant of power to the courts of the United States generally, and on the act of 1789, which conferred the jurisdiction on the district courts, and excluded the state courts. No notice is taken, in that opinion, of the clause conferring original jurisdiction on the supreme court. The exclusion of the state courts is not derived from it, but from the act of 1789; so, of course, that act was deemed constitutional.

This decision is in conformity with the contemporaneous construction of the constitution, given by the circuit court in the case of the United States v. Ravara, before referred to. And although the authority of that case was much doubted, after the opinions delivered in Marbury v. Madi- (7) son, Cohens v. Virginia, and Osborn v. United States Bank, and more especially on account of the high and just reputation of the eminent judge by whom those opinions were delivered, yet this vexed question ought, in my judgment, to be regarded as now settled by the case of Davis v. Packard.

It is worthy of remark, also, that the elementary writers, gen-

erally, seem to have regarded the act of 1789 as constitutional, and to have relied on the case of the United States v. Ravara: vide 11 Wheat. 473. (note); Rawle on the const. 221, 222; Conkling 160; Sergeant 17, 18.

Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used. The fact that the law in question was passed by such a body, is strong evidence that the words of the constitution were not intended to forbid its passage.

Nor am I by any means satisfied that the words used require a different construction from that given to them by the act of 1789. There are no express words of exclusion in the clause which confers original jurisdiction, in the cases mentioned, upon the supreme court. Why should they be implied? They are clearly not implied in relation to the state courts, in the clause immediately preceding, which gives judicial power in certain cases to the courts of the United States; for there are some subjects there enumerated from which it never could have been designed to exclude altogether the state authorities. For example, the constitution of the United States is the supreme law in the several states, and the courts of the states are bound to respect and interpret it, and to declare any state law null and void which (8) violates its provisions. Again, the laws of congress, when passed in the exercise of its constitutional powers, are obligatory upon the state courts, and must be construed by the courts, and obeyed by them, whenever they come in conflict with the laws of the state. It is true, that the decisions of the state courts must be subordinate to, and subject to the revision of, the supreme court of the United States, to whom the ultimate decision of such questions belongs; yet, the state courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them. If the grant of jurisdiction to the courts of the United States, generally, is not, by implication, the exclusion of all other courts, in the cases enumerated in that grant of power, why should the grant of original jurisdiction to the supreme court in certain cases, in the very same section, and by the next succeeding clause, be held to imply such exclusion? The original jurisdiction conferred on the supreme court is not inconsistent with the exercise

of original jurisdiction on the same subjects by the inferior courts of the United States, and there is no necessity, therefore, for implying an intention to exclude them.

Indeed, if the grant of original jurisdiction, in the cases mentioned, implied exclusion of jurisdiction on those subjects, the exclusion would seem most naturally to apply to the appellate jurisdiction of the court itself, and to prohibit it from the exercise of the latter in the cases where the former was given. The subject-matter of this part of the section is the jurisdiction of the supreme court, and it is divided into appellate and original. The cases are enumerated in which it shall have original jurisdiction; and appellate is given to it in others. Now it might very well be supposed, that in thus classing the subjects upon which it should have original, and upon which it should have appellate jurisdiction, the framers of the constitution meant to limit its jurisdiction in the manner in which it is (9) there divided, and to exclude it from original jurisdiction where appellate was given, and to exclude it from appellate where original was given; and this was supposed to be the construction given to it in the case of Marbury v. Madison, by the learned judge who delivered the opinion. But when the subject was further discussed and considered in the case of Cohens v State of Virginia, it became manifest, that such a construction could not be sustained, without depriving the supreme court of some of its most important and necessary powers; powers which, from the whole frame of the instrument, it was evidently intended that the court should exercise; and which, although classed in its original jurisdiction, it could exercise only in an appellate form, when the question arose in a suit in a state court. The language used in Marbury v. Madison was therefore qualified and explained, and it was decided, that the grant of original jurisdiction, in the cases enumerated, to the supreme court, did not exclude from appellate jurisdiction over the same subjects. And this latter construction is now the established law of the country. If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that

import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter.

Nor is there anything in the official character and func- (10) tions of a consul which should lead us to suppose , that the framers of the constitution mean to confine cases affecting such officer exclusively to the supreme court. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides ; and may be punished in its courts for any offense he may commit against its laws; Wheat. International Law 181; 1 Kent's Com. 43, 45. He, usually, is a person engaged in commerce; and in this country, as well as others, it often happens, that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul, in any part of the United States; that consul too, being often one of our own citizens. There is no reason, either of policy of convenience, for introducing such a provision in the constitution; and we cannot, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the act of 1789 is unconstitutional and void.

(11) The judgment of the district court in this case must, therefore, be reversed, and the motion to quash the writ which issued from that court overruled.

McMahon, for plaintiff in error.

Johnson and Glenn, for defendant in error.

GLASS v. THE SLOOP BETSEY, (1794, U. S.)
1 Whart. 796; 3 Dall. 6.
Jay, Supreme Court.

(Extract) And the said supreme court being further of opin-

ion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted is not of right.

GODDARD v. LUBY, (1795, U. S.—France)
1 Bay 435.
Grimke and Waties, Court of Common Pleas of South Carolina.

Case for slanderous words. On a motion made, a non-suit was ordered by the court, as the parties, plaintiff and defendant, were French citizens.

By the 12th article of the convention between France and America, for defining the functions of consuls, etc. it is declared, "that all disputes between the subjects of his most Christian Majesty in the United States, or between the citizens of the United States within the dominions of the most Christian King, etc. shall be determined by their respective consuls and vice-consuls, either by reference to arbitrators, or by a summary judgment without costs." Under the construction of this article, *the court* (present, GRIMKE and WATIES, Justices) referred the parties to the French consul for redress.

GOLDSBOROUGH v. UNITED STATES, (1889, U. S.)
25 Ct. Cl. 72.
Davis, Court of Claims of the United States.

[Where consul seeks to recover fees for certifying invoices of non-dutiable goods, there must be certainty in number of such invoices else claim irrecoverable.

A consul in China is entitled to fees collected for shipping and discharging seamen on foreign built vessel sailing under American flag.—ED.]

GOLUBCHICK, THE, (1840, Great Britain—Russia)
1, Rob. W. 143.
Dr. Lushington, High Court of Admiralty.

Judgment—Dr. Lushington.

The question which has been raised in this case, is the first question of the kind that has come before the court, since I have been in this chair. I have, therefore, felt anxious to examine carefully the

principle upon which this court exercises jurisdiction, with respect to seamen serving on board foreign vessels. In support of the protest, it has been urged, that the court has no jurisdiction, save by consent of the ambassador, consul, or minister of the country to which the vessel belongs. This notion, I am aware, has prevailed in these courts with re- (147) spect to cases of this kind, but I must confess, that I have always felt considerable difficulty upon the point; and for this reason, that if the court does not possess an inherent jurisdiction over the subject matter, it is not possible that the consent of an individual could confer any such jurisdiction. I think, therefore, that the proper mode of considering the question is this: the court must possess original jurisdiction over the subject matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British court of judicature.

Now upon general principle, I apprehend that this court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then be consistent with the principles of justice, that the exercise of this right should depend entirely upon the consent of a foreign minister or consul, who should be authorized to prohibit the court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other courts? In other courts of this country, I have no doubt, that the mariners might have instituted an action *in personam* against the master without reference to any consent at all. Why, then, should not the proceedings be competent on their part in this court against the ship? For by the general maritime law, the ship is the primary security for their wages. Is it just or proper, that the consent of the foreign representative should be necessary to put this court in motion, and should not be necessary in a court of common law? How is it possible there can be any such difference between them?

Upon general principle, then, I am inclined to (148) hold, that this court does possess a competent jurisdiction to adjudicate in these cases; at the same time, the exercise of this jurisdiction is discretionary with the court, and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the court might decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself, in which this difficulty might arise; that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice; in such cases, undoubtedly, the court would decline to adjudicate. Having thus stated my opinion, that upon general principle, this court has an

authority in cases of this kind between foreigners, and that the propriety of exercising that authority must depend upon the circumstances of each particular case, I will now shortly advert to the cases which have been reported. These are but few, and I cannot find that, in any of them, the point in question has ever been directly decided. In the case of the Courtney, which has been referred to by the counsel for the owners; it is true, that Lord Stowell, to whose high authority I should always be disposed to pay the greatest respect and attention, expressed himself in terms implying an opinion, that the court of admiralty could not entertain a suit of this kind without the consent of the representative of the foreign nation to which the vessel belonged; but it is to be observed, that the decision in that case is not a decision in point, insomuch that the mariners in that case sued for a penalty beyond their wages under an act of the American congress; the difficulty, therefore, which (149) Lord Stowell had to contend with in that case was, that he could not enforce the municipal law of the country upon which a part of the mariners' claim was founded.

The next case is the case of the Madonna d'Idra, reported in the first volume of Dodson; with respect to which it is also to be remarked, that the case reported does not bear very much upon the case in question. The vessel, it appears, had been sold in a cause of bottomry; a claim upon the proceeds was preferred by certain Greek mariners, and the question was, whether they were entitled to priority of payment. A further distinction is also to be noticed with respect to that case, namely, that the captain was bound by the law of Turkey to take his men back again, or to find them conveyance in other vessels; the mariners, therefore, had a lien upon the proceeds of the ship for their subsistence.

The next case is the case of the Wilhelm Frederick, 1st Haggard, but in this case, the question was only incidentally raised; the court held, that the ship at the time of arrest was a British vessel, the foreign owner having directed that she should be given up to satisfy the demands of British creditors. The decision in that case, therefore, was only to this extent, that the surrender of the vessel by the foreign owner was sufficient to entitle the seamen to proceed in this court to establish their claim. The last case to which I shall advert, is the case of the Adolph, 3d Haggard, p. 249; the proceedings in that case were *in poenam* against a Hamburg ship in a cause of bottomry, and an application was made to the court by one of the bondholders, that he might be allowed to pay the wages of the crew, and have a priority over the other bondholders for the (150) amount of the wages so paid out of the proceeds of the ship. Sir John Nicholl, before whom the motion was made, declined to make any order, upon the ground

that there was no one to consent. This was the extent of the learned judge's decision in the case of the Adolph, and although it bears more closely than the other cases to which I have adverted, upon the point to be decided in the present instance, it cannot, I think, be regarded as a positive decision upon the point in question.

The matter resting thus with respect to the reported cases, I shall now address my consideration to one or two of the circumstances peculiar to this case. In the course of the argument, a discussion has been raised by the counsel in the cause, whether the seamen promoting the proceedings are to be considered as Spanish subjects, or whether for the purposes of this suit they are to be regarded as subjects of the Russian government. Now, upon this point, I entertain no doubt whatever; it is, I conceive, a settled doctrine of law, that when a subject of one country enters into the service of a ship belonging to the subjects of another country, he must be considered *pro hac vice* to be a subject of that country to which the vessel belongs. As regards the promoters of the present proceedings, therefore, I have no hesitation in saying, that for the purposes of the present claim, they are to be considered as Russian subjects, and this upon general principle, without reference to the particular ordinance of the Spanish marine, which has been pleaded in the rejoinder that has been given in. Another point that has been pressed by the counsel in arguing the case, is the alleged discharge of the mariners in this country; and it was urged with considerable force (151) in support of the mariners' claim, that it would be an extreme hardship upon the seamen, if the court should allow them to be turned adrift in this country, and the vessel to proceed to any part of the world to which the owners might think fit to send her; thereby compelling the seamen to seek their remedy in a foreign tribunal, to which they might have no means of access from want of resources. Now this circumstance, if duly established, would undoubtedly be deserving of some consideration from the courts, at the same time, it must be observed, that the alleged hardship upon the mariners, if the court should decline to entertain their claim, could not of itself confer a jurisdiction upon the court; if the court were possessed of an original jurisdiction, it might furnish a strong inducement for the exercise of that jurisdiction in the present instance; but it would not give a jurisdiction which the court did not previously possess. It is also to be observed, that the fact itself of the asserted discharge of the seamen is directly put in issue in the pleadings. In deciding the question that has been raised, therefore, I cannot rely upon the fact whether they were discharged or not. The last circumstance in the case to which I must advert, is of a very peculiar nature; namely, that the court is entirely uninstructed as to the

original intention of the owners of this vessel respecting the termination of the voyage; and also respecting the nature of the hiring, and the terms upon which the mariners were engaged. These facts must have been within the entire knowledge of the master, and should have been explained in the protest. In the total absence of any information upon these points, the court is placed in some difficulty, for if it is to enter into a considera-(152)tion of the case, it is undoubtedly a matter of no small importance, that the court should know whether the vessel was destined to a Russian port, or to the port of any other country. Under the circumstances of the case, then, the course which I shall adopt is this; I shall direct the registrar to write a letter to the Russian consul, stating that the suit has been commenced, and requesting that he will make such a representation to the court as he shall think fit upon the subject. If he consents to the proceedings, there will be no further difficulty; if he refuses to consent, or declines to interfere altogether, I shall then have to determine upon the course to be pursued by the court under the circumstances.

Upon the 21st of May, a letter was addressed to the registrar of the court, by the Russian consul, to the following effect:

"RUSSIAN CONSULATE GENERAL,
21st May, 1840.

"Sir, I have the honour to acknowledge the receipt of your letter of the 16th inst., and in reply, to acquaint you, that having been informed by the owner of the Golubchick, who is a Russian subject, that the said vessel is no longer to be navigated under the Russian flag, but peremptorily to be sold here; I shall not in my official character as consul general of his imperial majesty of all the Russias, interfere in the cause, &c., &c.

"I beg, however, that this letter may not be construed on my part into an assent or a dissent from the proceedings which have been instituted against the vessel, without my sanction having been pre-(153) viously asked or obtained, and at the same time to inform you, that I consider much inconvenience would arise, if vessels trading to this country, Russian owned, and navigated under the Russian flag, were liable to be seized by process from the admiralty court in this country for wages due to the seamen under contracts which should be regulated by the Russian, and not by the British code of maritime laws. I have," &c., &c.

Upon the 2d session of Trinity term, 4th of June, 1840, the court finally disposed of the question, with the following observations:

Per Curiam.

Since the question was argued upon a former court day, I have had an opportunity of considering the case referred to in the American reports, viz., the case of the Jerusalem.

The decision in that case was pronounced by a judge of the highest eminence, Mr. Justice Storie; and the principles laid down in that decision most strongly confirm the previous impression of my own mind, that the court has a jurisdiction in all cases of wages as questions of general maritime law; although in some cases circumstances may arise to induce the court to decline the exercise of that jurisdiction.

In the present case I am relieved from all doubt and difficulty as to the course which I shall adopt, by the letter which has been addressed to the registrar of this court by the Russian consul. That letter states, that the vessel proceeded against is no longer to be navigated under the Russian flag, but to be peremptorily sold here. The voyage must, there-(154)fore, be considered as having terminated in this country, and the case is consequently one in which the court is bound to exercise its jurisdiction.

I must, therefore, overrule the protest, and allow the cause to proceed; and I wish it to be understood, that in all future cases of this kind, it must be held to be indispensable that notice of the intended proceedings should be given in the first instance to the representative of the foreign government. In so directing, I do not mean to intimate that the court would feel imperatively bound to act in accordance with the views that might be entertained by such representative; but I consider it is expedient that such intimation should be given in order that, if any objection should be taken against the prosecution of the proceedings in this court, the court being informed of the grounds upon which such objection is taken, might be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause. With respect to the question of costs, I shall give no costs; the question which has been raised is a question *primae impressionis,* in which I have in some measure already exceeded what any of my predecessors have done.

GOULD v. STAPLES, (1881, U. S.)
9 Fed. Rep. 159.
Fox, Circuit Court.

(160) (Extract) By section 1695 the president is authorized to appoint consular agents in such numbers and under such regulations as he may deem proper. By paragraph 17, consular regulations of 1881, consular agents are described as—

"Acting only as the representatives of their principals, and are subject and subordinate to them, and are paid only by the fees collected by them, retaining the whole or such portion as may be agreed upon between them and their principals, the residue being received by the principal, under the sanction of the president."

From these provisions of the statutes and established regulations, it is manifest that the consular agent of the United States at Toulon was in law a representative of the plaintiff, and that through him the plaintiff was in fact the consul for the port of Toulon, discharging all the duties of a consul at that port as effectually as if there present attending to them in person; and if the Charter Oak had arrived at Toulon her master would have been bound to have deposited his papers at the consulate in that city with the agent of the plaintiff, and on failure so to do would have been liable to the plaintiff for the penalty.

GRAHAM v. HOSKINS, (1845, U. S.)
Olc. 224; Fed. Cases 5,669.
Betts, District Court.

[Seamen's wages.
Seems to involve no consular question.—ED.]

GRAHAM v. STUCKEN, (1857, U. S.)
4 Blatchf. 50; Fed. Cases 5,677.
Nelson, Circuit Court.

(51) NELSON, J. (Extract) The first question presented on this application is, whether the court is without jurisdiction of the case, for the reason that the defendant Stucken is a foreign consul; for then, of course, no order for the writ sought to be obtained can be granted. The question has not been decided by any judicial authority, and was, it seems, purposely waived by the supreme court in the case of The United States v. Ortega, (11 Wheat. 467) (See also note to that case, 469 to 475; 1 Kent's Comm., 315; Curtis' Comm., sec. 108.) But, notwithstanding this apparent doubt, it is certain that the framers of the judiciary act of 1789 understood the consitution as admitting jurisdiction over foreign consuls to be vested in other federal courts besides the supreme court. The argument against the jurisdiction of this court is, that the constitution has vested exclusive jurisdiction in the case in the supreme court of the United States, and that this suit should have been commenced in that court. The last clause of section 2 of article 3 of the constitution declares, that "in all cases affecting ambassadors, other public ministers and consuls, and those

in which a state shall be a party, the supreme court shall have original jurisdiction." Congress, in distributing and regulating this grant of jurisdiction, provided, in section 13 of the judiciary act, that the supreme court should have exclusive jurisdiction in all cases against ambassadors, &c., and original, but not exclusive jurisdiction in cases "in which a consul or vice-consul shall be a party," thus clearly rejecting the idea that the grant in the constitution in respect to consuls was exclusively to the supreme court.

Again, the grant of original jurisdiction to the supreme court is the same in the cases (mentioned in the previous clause of the constitution) "in which a state shall be a party," as in the case of a consul. Those cases are controversies—1. Between two or more states; 2. Between a state and citizens of another state; 3. Between a state and foreign states; and 4. Between a state and citizens or subjects of a foreign state, that is, aliens. Now, if the grant of original jurisdiction be exclusive in the supreme court in the case of a consul, it is equally exclusive in the four cases above enumerated; for the grant is in the same clause and on the same terms. And yet, in the 13th section of the judiciary act, already referred to, it is provided that the supreme court shall have exclusive jurisdiction, &c., where a state is a party, &c., except between a state and citizens of other states, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. According to the argument, (53) the whole of this exception would be unconstitutional, as the cases mentioned should have been vested exclusively in the supreme court.

And, again,—what is still more explicit in respect to the practical construction of the framers of the judiciary act, many of whom were eminent members of the Convention that formed the constitution —the 9th section provides that the district courts of the United States shall have jurisdiction, exclusive of the courts of the states, of all suits against consuls or vice-consuls, &c.

In the face of all this legislative interpretation by the fathers of the constitution, and all this acquiescence therein since 1789, I cannot say that the jurisdiction in this case is exclusively in the supreme court, but am satisfied that it may be conferred upon the inferior tribunals of the federal judiciary. Being pressed for time, I have stated simply the grounds of this conclusion, without giving more at large the reasons in support of it.

It has been also objected that, admitting that the jurisdiction is not exclusive in the supreme court, still it has not been vested in the circuit courts of the United States. The 11th section of the judiciary act provides, that the circuit courts shall have original cognizance, concurrently with the state courts, of suits between a citizen of the state

where the suit is brought and a citizen of another state. The case before me falls directly within this provision. It is said, however, that the jurisdiction cannot be concurrent with the state court, as that court has no jurisdiction of the case, it having been excluded by force of the 9th section, already referred to. But the answer to this suggestion is, that the phraseology is designed simply to save the jurisdiction of the state court where it exists, in other words, to exclude a conclusion.

It has been said, also, that if the jurisdiction of the case is not in the supreme court, and may be vested in inferior courts, it has been expressly vested in the district court, which is true. But there is nothing in the provision conferring (54) it upon that court, that excludes the jurisdiction of the circuit court. I am satisfied, therefore, that this court has jurisdiction to hear and decide this motion, and also the case out of which it has arisen.

GRAVES v. THE W. F. BABCOCK, (1897, U. S.)
79 Fed. Rep. 92.
Brown, District Court.

(93) (Extract) There is no proper or sufficient proof of an intention by any of the men to desert. The master's testimony on this point is all hearsay, depending on reports of the mate, who left the ship and was not examined. The mate, he says, reported the men absent and their clothes missing. The weight of evidence certainly shows that the report in the latter respect was mistaken; the men's clothes were in bags in the forecastle all the time (except a couple of articles which one of the men had taken ashore to sell), and were there when the men returned to the ship February 26th.

The evidence does not satisfy me that there was any proper inquiry or finding by any one as to the fact whether the men, or any one of them, had deserted. Section 4600 of the revised statutes makes it the duty of consular officers "to reclaim deserters," and to employ the local authorities to that end. No express authority is given to lodge deserters in foreign prisons. But that section requires that "in all cases where deserters are apprehended, the consular officer shall inquire into the facts."

In the master's deposition appears a copy of a letter stating as follows:

"Shortly after the arrival of the ship W. F. Babcock several of the crew deserted. At the request of this office they were arrested and lodged in jail, where they complained to me of ill treatment at the hands of the mate. I summoned the master, and mate, also the men to appear before me. After a full

investigation found the charges to be without foundation. Their jail fees, rewards offered for them, etc., have been looked over by me and found to be correct as per vouchers.

"(Signed) Ellis Mills, General Consul."

This letter was objected to, and it is not legal or competent evidence as to the matters of fact stated in it. I have deferred the decision of the cause to permit evidence of any docket or record of inquiry as to the alleged desertion to be offered; instead of that a further certificate is offered under the seal of the consul, dated January 19, 1897, stating that in the month of February, 1896, complaints were successively made to him by the master that the above-named libelants had deserted,—

"Whereupon at the request of the master I issued requests to the marshal of this government for the arrest and detention of these men, and they were afterwards brought before me, and it then and there having been made to appear to my satisfaction that the aforesaid complaints were true * * * and that the seamen had deserted said vessel, and absented themselves without leave, whereupon at the request of the said master the said seamen were remanded to the jail at Honolulu to remain there until the said vessel should be ready to proceed on her voyage or till the master should require their discharge, and then to be delivered to the said master, he paying all the costs of said commitment and deducting the same out of the wages due to said seamen. And I further certify that the reason for my action was because I was satisfied that unless they were so detained they would again desert.

"Ellis Mills, Consul General."

This paper has not the appearance of having been prepared from any docket, record, or notes remaining in the consul's office. It does not purport to be a copy of any such record or notes; no dates, other than the month are given, and there is no direct statement that the consular officer made any inquiry into the facts. The latter part seems intended to follow the provisions of section 4598, which does not apply to proceedings before consular officers, but to proceedings before justices of the peace within the United States. In the case of The Coriolanus, Crabbe, 239, Fed. Cas. No. 7,380, Judge Hopkinson said: "I never suffer these certificates to be read; they are infinitely weaker than *ex parte* depositions."

To make proceedings before the consul evidence, there must be either a duly-proved copy of his record, or else his deposition, as in the case of other witnesses. These papers are neither, and must, therefore, be disallowed as evidence.

GRIFFIN v. DOMINGUEZ, (1853, U. S.)
2 Duer, New York City Superior Court 656.
Duer, Superior Court, New York.

[There is no right to examine in a state court a foreign consul as a judgment debtor and he cannot be attached by reason of any refusal to obey an order for examination.

"The exemption of a consul from suit in state courts is not his personal privilege—it belongs exclusively to the United States; and cannot therefore be waived by any act or default of the consul himself."—ED.]

GRIN, IN RE, (1901, U. S.—Russia)
112 Fed. Rep. 790.
Morrow, Circuit Court.

(Extract) That the proceedings should be initiated and carried on by the demanding government is undoubted, but that evidence of special authority from such government to the party making the complaint is necessary is a contention that cannot be upheld. The complaint herein contains the positive statement that it is made by the Russian consul stationed at the city of San Francisco. It recites that criminal proceedings upon the charge alleged have been instituted against the said Grin, that a mandate has been issued from the state department of this government for his surrender upon proper proceedings, and prays that the necessary proceedings may be had as directed in said mandate. The consular title is appended to the signature of the complaining party, and no presumption can arise from any portion of the complaint that it was made other than as and for the Russian government. The cases of *In re* Herres (C. C.) 33 Fed. Rep. 165, and *In re* Adutt. (C. C.) 55 Fed. 376, rightly hold such a showing in a complaint to be amply sufficient for the purposes of the document.

GRIN v. SHINE, (1902, U. S.)
187 U. S. 181.
Brown, Supreme Court.

(Extract) No evidence was required that the Russian consul had authority to make the complaint. All that is required by sec. 5270 is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government based upon depositions in his possession, although under the first article of the treaty the accused can only be surrendered upon a "requisition" of the foreign government, and by art. VI such requisition must be made by

the "diplomatic agent of the demanding government," and in case of his absence from the seat of government, by the "superior consular officer."

HAGGITT v. INIFF, (1854, Great Britain)
5 De G. M. & G. 911; 24 L. J., Ch. 120; 1 Jur. (N. S.) 49.
Lord Justices, Chancery.

Affidavits may be still sworn before notaries public in foreign countries, (having authority there to administer oaths) according to the old practice, which is not altered in this respect by 15 & 16 Vict. c. 86, § 22.

Mr. Nalder applied to their Lordships for a direction that the clerk of records and writs might place on the file an affidavit, sworn before Mr. Allen, a notary public at Geneva, in the county of Ontario, in the state of New York, in America. The fact of Mr. Allen being a notary public, and that credit ought to be given to his official acts, was certified by the British consul at New York, under the official seal. The clerk of records and writs doubted whether the *jurat* was sufficient. There was an affidavit of the solicitor in the cause, stating that he had applied to General Campbell, the American consul in England, who informed him that notaries public in the United States were authorized by law to administer oaths in any law proceedings in that country.

The application had been made, in the first instance, to Vice-Chancellor Kindersley, who, on being referred to the 22d section of the Chancery Amendment Act (15 & 16 Vict. c. 86), considered that the case was not within that section.

THEIR LORDSHIPS (after consulting Mr. Walker, the (911) registrar), said that the affidavit would have been sufficient before the passing of the new act, and that, as there appeared to be nothing in the act to exclude it, it ought, in their lordship's opinion, to be placed on the file.

HALL v. YOUNG, (1825, U. S.)
3 Pick. 80.
Parker, Massachusetts Supreme Court.

PARKER C. J. delivered the opinion of the court to the following effect. If it had been shown upon a plea to the jurisdiction in the original action, that Mr. Manners was a consul, a judgment against him would have been erroneous, and the bail would be discharged. But that fact does not appear on the record in that action, and the agreement to be defaulted was a waiver of the want of jurisdiction. It is said that all courts are to take notice of a person's being a con-

sul, on account of his *exequatur;* but he may be a consul one day and cease to be such the next, and yet his *exequatur* may not be taken from him. When therefore he is sued, if he would avail himself of his privilege, he must make it appear that he was a consul, unless the other party shows it; as by calling him consul in the original writ.

Judgment affirmed.

HARRISON v. VOSE, (1849, U. S.)
9 How. 372.
Woodbury, Supreme Court.

(Extract) (381) The proviso of the act seems to indicate that the papers are delivered to the consul chiefly as security for two purposes; viz., the payment of extra wages to seamen discharged, and the taking on board destitute seamen when bound home; and hence, if the master does not perform what is thus required, he is not entitled to his papers again, even after an entry and clearance.

* * * * * * * * *

(382) It is conceded that a consul is the chief representative and agent of his country in most foreign ports, and as such to be resorted to by his countrymen. * * * Those functions are principally to watch over our trade,—actual exports and imports; to exercise jurisdiction in some respects over American vessels and seamen abroad; sometimes of a judicial character (3 Taunt. 162), when they stop and come ashore, or to transmit information home in relation to them.

To be sure, he has a few other duties to perform. But most of them are disconnected with this subject;—as, to take care of American property, either wrecked or belonging to deceased persons; to exercise at times even diplomatic functions; to aid his countrymen in scientific researches; to transmit periodical advices on every thing beneficial to trade or the arts, and, in all emergencies among strangers, to act as the friend and agent of commercial visitors from his own country. Vattel, Law of Nations, Consuls; Warden's Consular Establishments; 2 Elliot's Am. Dep. Code, 454; 7 Pet. 276; Bee's Adm. 209; 1 Statutes at Large, 254, and note; 10 Wheat. 66; 1 Mason 14; 1 McCulloch's Dict., Consul, 465-467; 2 Beawe's Lex Mercatoria 42.

The first class of duties may have furnished some reasons for requiring that the papers of vessels be lodged with the consul after an arrival to stay and transact business, and that they remain with the consul till the vessel's clearance. All of that class look to an arrival for purposes of business—to an entry and clearance, and to a stay there so long as to require some of the acts connected with it, and to need or permit the interference of the agent of their country

in some of his appropriate (383) functions, and especially to enable him to report understandingly that her trade, or her imports and exports, are on American account, and are of a certain value and character.

HATHAWAY v. JONES, (1863, U. S.)
2 Sprague 56; Fed. Cases 6,212.
Sprague, District Court.

(Extract) If a man chooses to take money in a foreign port, at the price in that port, he can do so; but if he does not agree to it, he should not be compelled to take money when he does not wish for it, and at consular rates, which the evidence shows are, for some reason or other, almost always a good deal below what would seem to be the fair calculation of the market rate of the place, or the estimated New Bedford price, less freight home and insurance. By settling before the consul, a commission of two and a half per cent. was incurred. There is no reason for this. The discharge must be made before the consul, but the payment need not be before him. It may be with or without witnesses; and if before witnesses, no witness charges a commission for seeing money paid, and that is all the consul did.

HAVANA, THE, (1858, U. S.—Great Britain)
1 Sprague 402; Fed. Cases 6,226.
Sprague, District Court.

[Court will exercise jurisdiction in certain circumstances "It will do so for the purposes of justice, and the more readily, if no objection be made by the consul of the nation to which the vessel belonged."
* * * "As these (items), or some of them, may depend upon British law and usage, I shall invoke the aid of the British consul, by appointing him an assessor to ascertain what amount thereof, if any, should be allowed."—ED.]

HAYES v. J. J. WICKWIRE, (1870, U. S.)
7 Phila. 594; Fed. Cases 6,262.
Cadwalader, District Court.

CADWALADER, J.—This case arose upon a libel for wages and damages, allowed by the court upon the certificate of the British consul being filed, that there was, in his belief, sufficient cause for such process. The facts were, briefly stated, as follows: Libellant was a British seaman, shipped in Great Britain for the round voyage to Philadelphia and back to a port in Europe. After the ship's cargo was discharged at this port, the seaman went ashore one evening, was

arrested, by the local authorities for an alleged breach of the peace, etc., while in the city, and locked up for four days. Upon being discharged from prison, he immediately returned to the barque, with a certificate from the prison-keeper of the cause of his detention. The master, Murray, had meanwhile, at the expiration of forty-eight hours' absence from the barque, duly entered Hayes upon his log-book as a deserter—upon a charge of total desertion; and, when he reported himself upon the barque again, with the cause of his detention, the master declined to receive him on board; to recognize him as one of his seaman; to pay him his wages, or to give him his clothing.

The British consul was next appealed to; and, after an informal hearing of the master and mariner, at a time suggested by the master, decided that it was not a case of total desertion; and instructed the master that he should allow the mariner to return to his duty on the barque. This the master again refused to do. The mariner then took boarding at a seamen's boarding house and libelled the barque. Mr. Mitcheson, for libellant, contended that the libellant, having been wrongfully discharged before the termination of the voyage, and having been prevented from re-shipping, through the master's detaining his pay and clothing, was entitled to his wages until re-shipped; to his expenses for boarding whilst on shore; and to damages.

Mr. Coulston, for defendant, contended that libellant should only be allowed wages up to the time he left the vessel;—less the expense and increased wages incident to shipping another seaman in his place.

The court held, that the consul was right: and that the course of the master having been arbitrary and despotic in the detention of the seaman's clothing, etc., libellant was entitled to wages up to the time of decree; expense of boarding for twenty days, with damages for detention of his clothing, and for the clothing if not returned.

Decree accordingly.

HEATHFIELD v. CHILTON, (1767, Great Britain)
4 Burr. 2,016.
Lord Mansfield, King's Bench.

(Extract) The law of the nations does not take in consuls, or agents of commerce; though received as such, by the courts to which they are employed. This was determined in Barbuit's case in chancery. which was solemnly argued before and determined by Lord Talbot, on considering and well-weighing Barbeyrac, Binkershoek, Grotius, Wincquefort, and all the foreign authorities; (for there is little said by our own writers, on this subject.) In that case several curious questions were debated.

HERMAN v. HERMAN, (1825, U. S.—France)
4 Wash. C. C. 555; Fed. Cases 6,407.
Washington, Circuit Court.

Under an agreement of the solicitors, that an answer to be given in France may be taken and sworn to before any person authorized to administer oaths by the laws of France; the agreement is not complied with if the answer be sworn to before the American consul.

The defendant resided in France, and the solicitor for the plaintiff consented that his answer might be taken and sworn to before a notary public, or other person authorized to administer an oath by the laws of France. The answer was taken by the American consul, and the question now was, whether it was properly taken and sworn to within the terms of the agreement.

Washington, J. 1 Denisart, title Consuls, p. 519, has been cited to prove that, by the French law, consuls are authorized to administer oaths. But it is quite obvious that the author, in the place referred to, is speaking of the power and duties of French consuls, residing in foreign countries; and not of foreign consuls residing in France.

It was contended, for the defendant, that the act of congress concerning consuls gives them a power to administer oaths. We think that it is not generally given by this act, but that it is confined to particular cases of a maritime and commercial character. But if the power were general, it would not remove the difficulty, the agreement being, that the answer should be taken by some person authorized to administer oaths by the law of France. But for this agreement, it must have been taken under a *dedimus potestatem*.

The answer was not allowed.

Rawle, for plaintiff.

Duponceau, for defendant.

HERRES, IN RE, (1887, U. S.—Canada)
33 Fed. Rep. 165.
Brewer, Circuit Court.

[Authentication of extradition proceedings by U. S. vice-consul in Canada.

"In other words, the vice-consul is not a deputy, but an acting consul."—Ed.]

HERZOGIN MARIE, THE, (1861, Great Britain)
1 Lush. 292; 5 L. T. N. S. 88.
Dr. Lushington, High Court of Admiralty.

(Extract) Suits by foreign seamen were not formerly encouraged

in this court; they are now allowed upon a principle of comity, and with a view to prevent injustice to seamen. The jurisdiction of the court, however, is discretionary only, and the court requires as a condition that previous notice should be given to the consul or representative of the foreign state. Foreigners here are bound to some extent by the acts of their own government, and in shipping matters by the act of their consul. If the representative of the foreign state expresses his dissent to the suit, this court, though not bound to do so, will incline to hold its hand and remit the foreign master to remedy under the laws of his own country.

HEYNSOHN v. MERRIMAN, (1880, U. S.)
1 Fed. Rep. 728.
Choate, District Courrt.

[Statute regarding payment of wages for three months does not apply in case of sick sailor left without his consent.—ED.]

HILL v. THE SACHEM, (1894, U. S.)
59 Fed. Rep. 790.
Brown, District Court.

BROWN, District Judge. The evidence of incompetency of the libellant as cook, is not, to my mind, satisfactory. It is certain that after the arrival of the ship at Hong Kong, the captain was determined to get rid of the libellant as cook; and it is equally certain that the consul, before whom both went, endeavored to favor the captain's wishes, while he at the same time refused to afford the libellant any opportunity to prove his capacity or fitness for the place. The captain made no charges against him in the log until after the seamen had been sent ashore. The alternative was forced upon him, either to go back on board the ship and be disrated, or else to be discharged at Hong Kong; and that, without any hearing on the merits. This was an injustice to the libellant, and apparently an abuse by the consul of his position and influence.

Where a hearing has been had on the merits, on the demand of the master, or the seaman, and a proper record preserved of the consul's decision and judgment, discharging the seaman, it is ordinarily entitled to full credence, notwithstanding the contradictions made by the seaman afterwards, such as I have not unfrequently had in previous cases. In the present case, there was no hearing, no judgment, and no record, so far as the testimony shows. The libellant was paid $200, his wages up to the moment of discharge, which he received under protest. Such a forced discharge, with no hearing on the

merits, at a distant place, and with no pay beyond the day of discharge, is inhumane and opposed to the policy and the statutes of this country, (Rev. St. § 4580;) and it is no defense that it was abetted, so far as appears, by the irregular action of the consular office. The libellant was unable to obtain employment to return from Hong Kong, and took passage for San Francisco at an expense of $196, and thence to New York, at an expense of $91.50. To this I add one month's wages, $40, all of which, with interest, amounts to $347.15, for which a decree may be entered, with costs.

HINDE, SUCCESSION OF.

Hennen's La. Dig. Ed. 1861, p. 582.

[This case cited in 5 Moore 114, seems to contain nothing relative to consuls.—ED.]

HINDSGAUL v. THE LYMAN D. FOSTER, (1898, U. S.)
85 Fed. Rep. 987.
Hanford, District Court.

[In this case mate from American ship assaulted captain in foreign port—was sentenced to imprisonment and captain paid consul wages. Consul paid expenses of detention giving difference to mate.

If there was an misapplication, the consul and not the ship was liable.—ED.]

HITZ, EX PARTE, (1884)
111 U. S. 766.

[Seems to involve no points affecting consul.—ED.]

HOLLANDER v. BAIZ, (1890, U. S.)
41 Fed. Rep. 732.
Brown, District Court.

[See also *in re* Baiz. Seems to contain nothing but what is found *in re* Baiz.—ED.]

HOPE, THE, (1813, Great Britain)
1 Dod. 226.
Sir William Scott, High Court of Admiralty.

[Consuls have no authority to grant enemy's ships exemption from seizure—

In this case the belligerent consul seems to have remained in enemy's territory.—ED.]

HUTCHINSON, EX PARTE, (1848, Great Britain)
17 L. J. N. S. C. P. 111.
Per Curiam, Court of Common Pleas.

(Extract) A special commission had been issued to three merchants at Maderia, or any two of them, to take the acknowledgment of a married woman, under 3 & 4 Will. 4. c. 74. s. 83, which was certified to have been done at Maderia. The *jurat* to the certificate was in the following form:—

"Sworn in the island of Maderia, on the 27th of November, in the year of our Lord 1847. Before me,

(Signed) "GEORGE STODDART,

"Her Britannic majesty's consul, and authorized by the laws of the island of Madiera to administer oaths in the island of Madiera."

On the same parchment was added the following certificate:—

"I, Servulo Nicolao Sowzao Drommond, notary public, &c. at Madiera, certify that her Britannic majesty's consul, as such, is entitled to administer oaths in the island of Madiera."

COLE now moved that the officer of the court might be directed to receive and file the above certificate, &c., which he had objected to do without the order of the court.—It was suggested, first, that the certificate should have specified the place at which the acknowledgment was taken; but it is submitted, that the words "at Madeira" are sufficient, and that the place in the island where the commission was executed need not be now precisely defined. *In re* Shufflebottom[1] decides that a certificate stating that the acknowledgment was taken in Philadelphia is sufficient. The general rules of this court of Hilary term, 1834,[2] do not direct how certificates of acknowledgment, taken under special commissions, are to be verified; those rules are to be confined to acknowledgments in this country, and the officer has adopted the practice with respect to acknowledgments taken abroad under this act, which prevailed in this court under the rule of this court of Hilary term, 14 Geo. 3.,[3] relating to common recoveries. It has been held that the 6 Geo. 4. c. 87. s. 20, which authorizes a British consul at a foreign port to administer oaths, &c., does not

[1] 6 Scott, 898.
[2] 1 Bing. N. C. 242; S. c. 3 Law J. Rep. (n. s.) C. P. 1.
[3] By which it is ordered, "That if the party or parties shall be in Ireland, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place, where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify, in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same."

give such consul power to act in cases of this nature, where there are native authorities to administer the oath—*In re* Eady;[1] but as it appears here from the *jurat*, that the British consul can administer an oath in Madeira by the laws of that place, which fact is duly authenticated by the certificate of a public notary at Madeira, the spirit and intention of the act, as well as the practice of this court, are abundantly satisfied.

Per Curiam.—We think the certificate of the notary shews that the British consul was authorized to administer the oath, and therefore the certificate, &c. may be received and filed.

Motion granted.

HUTCHINSON v. COOMBS, (1825, U. S.)
Ware. 65; Fed. Cases 6,955.
Ware, District Court.

(Syllabus) The certificate of a consul that the seaman was discharged with his approbation, will not preclude the court from inquiring into the cause of the discharge, and awarding damages, if the discharge was unjustifiable.

IASIGI, IN RE, (1897, U. S.)
79 Fed. Rep. 751.
Brown, District Court.

* * * * * * * *

BROWN, District Judge. This is a proceeding by *habeas corpus* to procure the release of the prisoner, the Turkish consul general at Boston, from custody, upon a commitment made by a city magistrate on a charge of embezzlement in Massachusetts in violation of the law of that state, but not in violation of any statute of the United States. The commitment was in pursuance of a law of the state of New York, authorizing such a commitment for 30 days to await any requisition from the governor of Massachusetts.

(752) The petition avers that the accused is the consul general of the sultan of Turkey, at Boston, duly recognized as such by the government of the United States; that the embezzlement is charged to have occurrerd on July 1, 1892; that he was arrested while on a visit here, where access was impossible to his books and papers to vindicate himself; and that no indictment has been found against him; and it is contended that the proceedings before the city magistrate were without authority or jurisdiction, because of the petitioner's consular office. The amended return to the writ shows that the petitioner is a native-born citizen of Massachusetts.

[1] 6 Dowl. 615.

A consul is not entitled, by virtue of his office as consul merely, to the immunities of a foreign minister. On the contrary, according to the rule of international law, he is subject civilly and criminally, like other residents, to the tribunals of the country in which he resides. 1 Kent, Comm. *44; Wheat. Int. Law (Lawrence's Ed.) 423; The Anne, 3 Wheat. 435; Gittings v. Crawford, Taney, 1, Fed. Cas. No. 5,465; Coppell v. Hall, 7 Wall. 542, 553; *In re* Baiz, 135 U. S. 424, 10 Sup Ct. 854; Hollander v. Baiz, 41 Fed. 732.

Under our dual judicial system, state and federal, in the absence of any special provision of law, the petitioner would, therefore, be subject to arrest and prosecution in the local tribunals in the same manner as other persons; so that the question presented is not one of immunity from punishment, but only as to the proper mode of proceeding, and whether his commitment and detention by a city magistrate under a state law for rendition to Massachusetts, where alone the offense can be tried, are unlawful.

The provisions of the constitution, and the acts of congress thereunder, as respects public ministers and consuls, create a limited class of cases which are *sui generis*. By the second section of the third article of the constitution the judicial power of the United States is extended to "all cases affecting ambassadors, other public ministers, and consuls;" and as to this special class of cases the constitution in the same section further declares that "the supreme court shall have jurisdiction." Thus all cases affecting consuls, whether civil or criminal, and whether arising under acts of congress, or under the common law or state statutes, are made cognizable by the supreme court, and thus "cognizable under the authority of the United States," without any further action by congress. U. S. v. Hudson, 7 Cranch, 32, 33. Under the general grant of judicial power, congress, however, further provided by the judiciary act of 1789 (1 Stat. 73) that the supreme court should have "original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party" (section 13); that the district courts "shall have, exclusive of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, where the punishment should not exceed six months' imprisonment," etc.; "and shall also have jurisdiction, exclusive of the courts of the several states, of all suits against consuls and vice-consuls, except for offenses above the description aforesaid (section 9); and that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States (except where otherwise (753) provided), and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein."

Under these provisions it remained the accepted law until 1875, that the federal courts had exclusive jurisdiction of offenses by consuls, whether at common law or under state or United States statutes. The ordinary rule that the United States could not punish common law or state offenses, did not apply. U. S. v. Ravara, 2 Dall. 297; Com. v. Kosloff, 5 Serg. & R. 545; U. S. v. Ortega, 11 Wheat. 472, 473, note. And Tennessee v. Davis, 100 U. S. 257, and Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, were decided on the same principle.

The provisions of the judiciary act were carried into the United States Revised Statutes (enacted June 22, 1874) without any substantial change, but under a different arrangement. See section 563, pars. 1, 17; section 629, par. 20; section 687; section 711, pars. 1, 8. By this latter paragraph (8) the jurisdiction of the state courts was excluded in all "suits or proceedings" against consuls. The word "proceedings" in that paragraph was new; while the word "offenses," which was in the exception in section 9 of the judiciary act, was omitted in paragraph 8 of section 711.

By the act of February 18, 1875 (18 Stat. 316, c. 80), the eighth paragraph of section 711 was stricken out. The provisions of sections 563 and 629 conferring jurisdiction on the federal courts in all cases against consuls, both of crimes and of suits, were left untouched; and so was the exclusive jurisdiction of crimes and offenses under the first paragraph of section 711.

It is contended that by the repeal of the eighth paragraph of section 711, referring only to "suits or proceedings" against consuls, the jurisdiction of the state courts is opened to the prosecution of consular crimes and offenses against the state laws; whereas it is urged in behalf of the petitioner that this repeal gives no such jurisdiction to the state courts, but leaves consular offenses cognizable as before in the federal courts alone, both by implication, from the nature of the consular relation, which involves the United States with foreign powers, and also by force of paragraph 1 of secion 711 which gives the federal courts exclusive jurisdiction over "all crimes and offenses cognizable under the authority of the United States." See Miller, Lect. Const. pp. 325, 326; Cooley, Lect. Const. p. 53; U. S. v. Ravara, *supra;* per Story, J., in U. S. v. Coolidge, 1 Gall. 488, Fed. Cas. No. 14,857; per Tilghman, C. J., in Com. v. Kosloff, 5 Serg. & R. 585.

As respects any actual intention of congress, the repeal of paragraph 8 of section 711, by the act of 1875, affords no light. The explanation of that repeal is difficult, if not impossible. The act is entitled "An act to correct errors and supply omissions" in the revised statutes of the United States. It embraces over 70 different subjects;

and the first section of the act declares that the amendments therein made are made "for the purpose of correcting errors and supplying omissions" in the revised statutes "so as to make the same truly express" the laws in force on December 1, 1873. There is no doubt that on December 1, 1873, the jurisdic-(754)tion of the federal courts over consular offenses was exclusive. In both houses of congress when the bill was presented, as appears from the Congressional Record, members were induced to withdraw proposed amendments on the positive assurance that this act contained no new legislation and was solely for the purposes above expressed. So far as concerns crimes and offenses, it may have been considered that the first paragraph of section 711 included all offenses committed by consuls; and that the eighth paragraph had no reference to "offenses," as it covered only "suits or proceedings." But no such explanation is possible as regards civil suits against consuls, which were certainly embraced in paragraph 8 of section 711, and nowhere else; and that paragraph probably referred solely to civil suits. But however it came about, the act of 1875 was passed, and paragraph 8 of the revised statutes stands repealed. So that, as stated by Mr. Justice Harlan in Bors v. Preston, 111 U. S. 261, 4 Sup. Ct. 407, there is now no statutory provision, which, in terms, makes the jurisdiction of the federal courts exclusive in suits (i. e. civil suits) against consuls. But the declared purpose of the act, and the circumstances of its passage, deprive the repeal of paragraph 8 of any effect by implication, beyond the necessary meaning of the repeal itself. Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39, 15 Sup. Ct. 508.

There is a manifest propriety, amounting sometimes to a practical necessity in order to avoid international complications, that the prosecution, punishment or pardon of consuls which would necessarily materially affect their personal attention to their consular duties, should be within the control of the federal courts and of the federal government to which the consuls are accredited and which alone is responsible to foreign powers for the treatment of their representatives. While imprisonment for debt continued, the same considerations, though in a less degree, applied to civil suits. But since imprisonment for debt has been abolished, the grounds for exclusive federal jurisdiction in civil suits against consuls exist in but small degree, if at all; while in all criminal cases, all the original considerations of policy and propriety remain unchanged.

I do not thing it, however, necessary or appropriate at this time to pass upon the question whether the jurisdiction of the federal courts over consular offenses is now concurrent with the state courts, or ex-

clusive of the state courts, either by implication, or under paragraph 1 of section 711. The only question needful for me to determine is whether the petitioner is unlawfully held in custody. The offense with which he was charged is an offense against the state of Massachusetts. He was committed by a committing magistrate under section 829 of the criminal code of New York, which undoubtedly covers the case in general terms, making no reference to the official position of the accused. As a consul is amenable to the local law, his arrest and detention are, therefore, lawful, unless they are prohibited by implication or by section 711 of the revised statutes of the United States. But that section, even giving to its terms the broadest effect, goes no further than to exclude "the jurisdiction of state courts." This refers to proceed-(755)ings which are properly in court, or form some part of the action of a court. It does not extend to proceedings out of court. It does not forbid the exercise of the police power of the state, nor the arrest of a consular officer by a policeman when committing a crime, nor his consequent detention for surrender to the proper tribunal for punishment. And so the commitment of a consular offender by a magistrate, merely for the purpose of transmitting him to the state where the crime was committed, and where alone he can be tried, is not a proceeding in court or by any court, (Robertson v. Baldwin [Jan. 25, 1897] 17 Sup. Ct. 326), and therefore not prohibited by section 711. And so whatever implications in favor of exclusive federal jurisdiction in consular cases may be claimed, they are in no way incompatible with a preliminary arrest by a state magistrate for removal to the proper state for trial in whichever tribunal is appropriate. The object of any such exclusive jurisdiction in the federal courts, if it still exists in fact, is evidently quite foreign to such a preliminary proceeding as this, the purpose of which is the transmission of offenders to the state where the offense is committed, to be there brought to trial in the appropriate court, whether state or federal. All quesions under the United States statutes as to the proper tribunal for a trial of the cause can be more appropriately heard and determined there. This course seems the more proper in a case like the present, inasmuch as section 1014 of the revised statutes, the only one under which removal could be had through federal proceedings, is limited to cases of "crimes or offenses against the United States"; and this is not such an offense. Either, therefore, the petitioner must be amenable to such proceedings as the present, or else he cannot be arrested or sent back at all. As I cannot find that the arrest and detention of the accused under the law of this state, for the purposes specified, are unlawful, the application must be denied.

IASIGI v. VAN DE CARR, (1897, U. S.)
166 U. S. 391.
Fuller, Supreme Court.

(393) (Extract) The contention of petitioner was that no court of the state of Massachusetts had jurisdiction to entertain a criminal prosecution against him by reason of the matters specified in the commitment, jurisdiction being vested, because of his official position, exclusively in the federal courts; but the conclusion of the district court rested on the ground that whatever implications in favor of exclusive federal jurisdiction might be claimed, they were in no way incompatible with the preliminary arrest by the magistrate for removal to the state where the crimes charged against him were alleged to have been committed, and where all questions as to the proper tribunal for trial could be more properly heard and determined.

On the argument in this court, it appeared from a communication from the assistant secretary of state, under date of March 19, that Iasigi had been removed from his consular office, and that all official connection between him and the Turkish government had been severed, as the department of state had been officially informed by the Turkish minister on the ninth of March.

Therefore when the order remanding Iasigi to the custody of the state officer was entered, he was not holding a consular office, and the supposed objection to his detention for extradition to Massachusetts did not exist.

As under § 761 of the revised statutes it is the duty of the court, justice or judge granting the writ, on hearing, "to dispose of the party as law and justice require," the question (394) at once arises whether the order of the district court dismissing the writ should be reversed, and petitioner absolutely discharged, because the objection existed when the writ issued, although it did not when the order was entered, even if such an objection were ever tenable, which we do not intend in the slightest degree to intimate it could be.

If the application for the writ had been made on the twelfth of March, it could not have been awarded, on the ground alleged in this petition, and as, on that day, the petitioner could not have been discharged on that ground, in accordance with the principles of law and justice, we are unable to hold that the order of the district court was erroneous. *Ex parte* Royall, 117 U. S. 241; *Ex parte* Watkins, 3 Pet. 193, 201; *Ex parte* Milligan, 4 Wall. 2, 111.

INDIAN CHIEF, THE, (1800, Great Britain—U. S.)
3 Rob. C. 26; 2 Phillim. (2d Ed.) 310.
Sir William Scott, High Court of Admiralty.

(Extract) I am first reminded that he was American consul, although it is not distinctly avowed that (27) his consular character is expected to protect him; nor could it be with any propriety or effect, it being a point fully established in these courts, that the character of consul does not protect that of merchant united in the same person. It was so decided on solemn argument in the course of the last war, by the lords, in the cases of Mr. Gildermester,[1] the Portuguese consul in Holland, and of Mr. Eykellenburg,[2] Prussian consul at Flushing. These cases were again brought forward to notice in the case of Mr. Fenwick,[3] the American consul at Bourdeaux in the beginning of this war; on whose behalf a distinction was set up in favor of American consuls, as being persons not usually appointed, as the consuls of other nations are, from among the resident merchants of the foreign country, but specially delegated from America, and sent to Europe on the particular mission, and continuing in Europe principally in a mere consular character. But in that case, as well as in the case of Sylvanus Bourne,[4] American consul at Amsterdam, where the same distinction was attempted, it was held that if an American consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than existed in the case of any other consul. The moment he engaged in trade, the pretended ground of any such distinction ceased; the whole of that question therefore is as much shut up and concluded as any question of law can be.

INFANTA, THE, (1848, U. S.)
Abb. Adm. 263; Fed. Cases 7,030.
Betts, District Court.

(268) (Extract) It is expected that a foreign seaman seeking to prosecute an action of this description in the courts of this country, will (269) procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reason will be shown for allowing his suit in the absence of such approval.

Upon the libel of Wood, however, it appears that he gives a credit to the exact amount of his wages, and upon the shipping articles there is endorsed the certificate of the British vice-consul at this port, "that the master has, with his sanction, discharged and paid off Robert Wood, the first mate," dated July 3, 1847. If this evidence does not conclude Wood in any court, it, at all events, affords satis-

[1] Concordia, Lords, Feb. 5, 1782.
[2] The Het Huys Brandenburg, Lords, July 16, 1784.
[3] Pigou, Lords, July 18, 1797.
[4] Orion, Cushing, Admiralty, March 24, 1797.

factory reasons to this court for declining cognizance of the matter, and for remitting him to the tribunals of his own country, where the validity and effect of these official transactions may be properly investigated and determined.

On the same day, the vice consul certified in the articles, that the master "reports the desertion of George States and other seamen." Any court would receive with great distrust any document or deposition of the master, attempting to set up his free discharge of States from the ship, anterior to such official report that the seamen had deserted. It certainly presents a case more pertinent to the jurisdiction of the British courts, which can more appropriately measure the acts of the official agent of their government, and determine the rights of their own subjects, than can a foreign though friendly tribunal, which might fail of setting a just appreciation upon the polity of her laws of navigation and trade, and might thus unintentionally counteract important public interests in attempting to adjudicate upon the individual demands of her subjects.

Upon these considerations, I shall dismiss both these libels; and to protect the vessel and her master in the ports of the United States against a repetition of these suits, a decree for costs will be ordered against the libellants.

Decree accordingly.

INVINCIBLE, THE, (1816, U. S.—France)
1 Wheat. 238.
Johnson, Supreme Court.

[Only mentions that the French consul interposed a claim in behalf of the French owners.—ED.]

JENKS v. COX, (1872, U. S.)
1 Holmes 92; Fed. Cases 7,277.
Shepley, District Court.

[Consul paid off sailor calculating price of oil at Sandwich Islands instead of that at home port. Court decided that seaman had a right to recover difference although discharge was by mutual consent. —ED.]

JONES v. LE TOMBE, (1798, U. S.—France)
3 Dall. 384.
Per Curiam, Supreme Court.

Capias in case. This was an action brought, originally, in the supreme court, by John Coffin Jones, a citizen of Massachusetts, as

indorsee of James Swan, against the defendant, the consul general of the French republic, as drawer of a number of protested bills of exchange (for the aggregate amount of 385,964 livres turnois, 3 sols 8 den. equal to 70,052 dollars and 46 cents) corresponding with the following form:

Consulat General

Près les Etats Unis.

Philadelphie, le ... an ...de la République Francaise, une et indivisible. } 179 (v. s.)

Argent Tournois—— faisant, à 18 cents et 15-100e cent de Dollar par livres tournois

CITOYEN,

An.....

No. .....

TROISIEME.

A trente jours de vue, je vous prie de payer par cette troisième de change (la première, la seconde ou la quatrième ne l'étant) à l'ordre de .....la somme.....tournois, en écus de six livres ou autres espèces d'or ou argent, à la valeur réduite de dix-huit cens et quinze centiémes de cent de Dollar, par livres tournois, ou en Lettres-de-change sur Hambourg, à l'acceptation et au change convenus avec le Porteur, valeur reçue de dit, conformément au compté rendu au Ministre de.....par dépêche du.....an....No.... timbrée...et à ma lettre d'avis en date de ce jour No..

(Signé) Le Tombe,
Le Consul Général

Au Citoyen Payeur Général des dépenses du Département de..

A la Trésorerie Nationale, A Paris.

Je prie le Citoyen Ministre de..... de faire acquitter la présente de laquelle j'ai garanti le payment sur l'honneur de la Nation Francaise.

(Signé) Adet,
Le Ministre Plénipotentiaire de la République Francaise près les Etats Unis d'Amérique.

Enregistrée sous le No. ... au Consulate particulier de la République Francaise.
A Philadelphie, le .....
an ...
(Signé) Le Consul,
Lett.

(385) At the opening of the term, Dallas and Du Ponceau had obtained a rule, that the plaintiff show his cause of action, and why the defendant should not be discharged on filing a common appearance; and now Ingersoll and E. Tilghman showed cause, produced the bills

of exchange, and the plaintiff's positive affidavit of a subsisting debt, including a declaration, "that he was induced, principally, to purchase the bills, in consideration of the character and private fortune of the defendant, and that without the fullest confidence in the personal credit and responsibility of the defendant, he verily believed he would not have purchased them." They then contended, that the positive affidavit was sufficient, in this court, for holding the defendant to bail; that it was not incumbent on them to show to whose use the money was applied, since it was paid to the defendant; that when a consul acts as a merchant, and draws bills for cash advanced, he is not entitled to any privilege; that the defendant must prove that he had a right to draw the bills as consul; that even if he had the right to draw, he might pledge his private credit, in aid of his official function; and that the critical situation of the French Republic raises a presumption, that the reliance was placed on the private credit of the defendant. The cases heretofore decided in the English courts, are perfectly distinguishable from the present case. 1 T. Rep. 174. They occurred between parties belonging to the same government; and there was no proof of credit being given to the individual. In support of these positions were cited, 2 H. Bl. 554. Vatt. b. 4. c. 6. s. 74. p. 139. s. 114. 2 Dall. Rep. 247. 2. Stra. 955.

The counsel for the defendant were stopped when they rose to reply; and the court were unanimously and clearly of opinion, that the contract was made on account of the government; that the credit was given to it as an official engagement; and that, therefore, there was no cause of action against the present defendant.

The rule was, accordingly, made absolute; and the plaintiff soon afterwards discontinued the action.

JORDAN v. WILLIAMS, (1851, U. S.)
1 Curt. 69. Fed. Cases 7,528.
Curtis, Circuit Court.

It is the duty of the master to interpose and quell an affray between the mate and the crew, and to use such means and such a degree of force as a competent master, of ordinary coolness, judging of the emergency upon the instant, might fairly deem necessary. (70)

Under the act of congress of July 20, 1840, s. 16, the phrase, "to lay their complaints before the consul," applies only to such causes of complaint as are specified in the act, viz., that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, &c., &c., and not to affrays or quarrels between the officers and crew.

The liberty given to the crew by said act, to lay their complaints before the consul, is to be exercised under the fair and reasonable discretion of the master of the vessel, as to the time and mode of landing; and a refusal of duty on the

part of the crew, because such permission is not given, would be justifiable only when such refusal is necessary to prevent the loss of the right.

Since the passage of the act of July 20, 1840, when the master of a vessel, in a foreign port, lays a complaint against any of his crew fully and fairly before the consul, and the complaint is such that a competent master may fairly believe it to be within the consul's jurisdiction, and the consul, upon examination, finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a *tort*, the consul being answerable to the injured party for any malversation or abuse of power.

The detention by the master of the clothes of men imprisoned by the local authorities upon request of the consul, by reason of information given him by the master, while still belonging to the vessel, and also after their discharge therefrom, is a breach of duty on the part of the master.

These were libels filed in the district court by Williams and Gates, two of the crew of the bark Gibraltar, against Jordan, the master, complaining of an assault on board the bark, an imprisonment in the jail at Matanzas, and a conversion of the clothing of each libellant. The libellants testified for each other, and produced no other evidence. The material facts appear in the opinion of the court.

The case was argued by R. H. Dana, for the appellant, and J. H. Prince, for the appellees.

CURTIS, J. The material facts, stated in the libels and testified to by the libellants themselves, are that, on the morning of the 11th of April, while the bark was lying in the harbor of Matanzas, the mate came forward at (71) daylight and called all hands. No answer was made to this call. The call was repeated, in what one of the libellants characterizes as a loud, boisterous, and profane manner. Thereupon, Gates made answer, "You need not kick up such a noise, for you were answered the second time." Some insulting words then passed between the mate and Gates; Williams interposed in the quarrel, the mate struck Williams with his fist, the blow was instantly returned, Williams and the mate clenched each other; the master came forward and seized Williams by the hair of the head and drew him down to the deck, or, as Williams says, toward the deck, and, while he was in that position, the mate kicked Williams in the face. Williams cried out, that the mate was kicking him; and Gates approached and said, "Knock off such work as this!" The master let go his hold of Williams, and struck Gates twice in the face. The contest then ceased; the master ordered the men to go to their work, and both officers went aft. The answers of the master state, that he knew nothing of the affair, being below, until two of the crew came aft, and called to him that the men were trying to kill the mate; that he ran on deck, and found five of the men, who constituted, at the time, the whole crew, except two men and a boy, attacking the mate; that he rescued the

mate from them, and in so doing received a blow from Gates, and part of his clothing was torn off his back. He denies that he seized Williams in the manner stated, or that, to his knowledge, the mate either struck or kicked him; and he sets forth in his answer that, by reason of the lapse of upwards of a year between the termination of the voyage and the filing of these libels, the mate, and the two men who were faithful to their duty, have gone beyond his reach, so that he can not produce either of them as witnesses.

I do not deem it necessary, in this part of the case, to (72) weigh very nicely the evidence of the libellants and the answers of the master, so far as they differ; because it does not seem to me that, if all which the libellants testify to were true, damages for an assault by the master ought to be awarded to either of these men. So far as appears, the first knowledge which the master had of this contest was when he saw his first officer and one of the crew grappling with each other on the forecastle, four others of the crew being close at hand, even if they were not taking part in the affray. These men constituted, at that time, the whole crew, except two men and a boy; and one of these two men is said to have been a deserter from a British ship of war, who kept himself concealed in the daytime in the hold. There was no second mate on board, the first mate having been discharged at Havana, as appears by the shipping articles, on the 10th of the preceding March; and though Rooker, the second mate, was, on the same day, promoted to be first mate, no second mate was shipped; and it was not until the 17th of April that Reed, one of the crew, was appointed second mate. So that, when the master first saw this affray between his only officer and one or more of the crew, he had reason to believe that one man and a boy were the only assistants on whom he could rely. That it was not only his right but his duty to interpose. and put an end to the contest immediately, there can be no doubt; and it is equally clear, that he was justified in using such means as a competent master, of ordinary coolness, judging upon the instant of the facts before him, might fairly deem necessary. It should be added that, from the nature of such an interposition, if force be necessary, the person thus lawfully using it, to quell a fight between an officer and one or more of the crew, cannot reasonably be expected to measure his exertions by so nice a standard as would be necessary if (73) there were time for reflection, and opportunity to proportion the force exactly to meet the demand for it. Tested by these principles, I am not satisfied that the force used by the master was excessive. Interposing, as he did, to rescue the mate, it is, to my mind, highly improbable that he struck Gates, unless Gates was assisting Williams in attacking the mate; for it appears there had been no

previous difficulty between them, and it was not an occasion when the master would have been likely voluntarily to begin a new quarrel. He used no weapon. He did not manifest any passion; and as soon as the mate was released he went aft, telling the men to go to work. This does not seem to me to be a fit case in which to award damages against the master, for an assault, in favor of these libellants, who, according to their own showing, were both originally in the wrong. Not to answer when an order was given and heard, and this order is admitted to have been heard, was a breach of discipline which might well excite the mate, and cause him to repeat the order with violence of manner, which they who had thus provoked it had scarcely a right to complain of, and still less a right to make an insulting reply,—an insult, perhaps the more readily given, and more deeply resented, because the mate had been very recently promoted to that office, from the post of second officer, in which, for many purposes, he was scarcely more than one of the crew. It is true, the assault by the mate, if he struck the first blow, was unjustifiable; but for this the master, who denies all knowledge of it, and who is not proved to have known it, cannot be held responsible; his duty being to put an end to the affray, whoever began it. For this cause of action, therefore, I can award no damages.

The second ground of complaint is, that the master caused the libellants to be imprisoned on short, in the (74) prison of the local authorities at Matanzas. This is attended with much more difficulty, and presents some questions of general importance, which, so far as I have been able to learn, are now for the first time raised. The material facts sworn to by the libellants, so far as they agree in their statements, are these: that, very soon after the termination of the affray above mentioned, and while the libellants and three others of the crew were engaged in removing the main hatch, the mate said to them, with an insulting address, "I will knock your brains out with a handspike." Williams then said to the master, "Captain Jordan, do you hear that?" And he replied, with an oath, "I do hear it." Williams then said to the master, "I will do no more duty on board this ship until I see the consul." Gates and the other three men said the same; and all five left their work and went forward into the forecastle. The mate came to the forecastle door, and said to Williams, "Williams, are you going to turn to?" The reply was, "No, not until I have seen the consul." The mate told him he was a fool, and he had better think no more about it. The master then came forward, and asked each man if he was going to turn to. Each said no, until he should see the consul. The master replied, with an oath, that they should go in the ship, and that they would wish themselves in hell

before the voyage was up. He soon after went on shore, returned with two boats and armed men, who carried the men on shore and took them to prison. On the next day, or the next day but one, the consul came to the prison; they informed him of what had taken place, and he said he would see into it. In a few days he returned, the master being with him, and asked the men if they did not think they had better settle it, and go aboard of the ship again, and he repeated the question to each man. All but one replied, that they were afraid of their (75) lives, after the threats that were made; and that one said he would go, if the consul would give him a paper showing what had happened on board. This the consul refused. A few days afterwards, the master came again to the jail, asked if they were not tired of staying there; and said he had paid three months' board, and there might be enough for another month. He went away; and, on the 8th of May, the consul took them out of jail and sent them to the United States. This is the account given by the libellants themselves. In some material points it is directly met by the answer, and is not consistent with the certificate of the consul, which has been read as evidence by agreement, as a substitute for the consul's deposition, who, it is stated, has ceased to hold that office, and could not be found by the respondent. I shall hereafter advert to some of these discrepancies; but, before doing so, I must inquire whether the men were justified in their refusal to do any more duty on board until they could see the consul. This right is claimed under the 16th clause of the act of July 20th, 1840, which is in these words: "The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith, stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon, it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as the act directs." This does not, in terms, give to the crew the right to refuse to do duty until they can see the con-(76)sul. It may fairly be implied, that they are not bound to do such duty as would prevent the exercise of the right to see him. They cannot be lawfully required to get under weigh to go to sea, and thus be deprived of the right to lay before him their complaint of the unseaworthy condition of the vessel; they cannot properly be kept at work, and thus prevented from landing to lay their complaint before him, unless some sufficient and valid objection exists against their landing.

But it by no means follows that they have the right, at any moment, to refuse to do any duty whatever till they have seen him. The master is to allow them the fullest liberty to lay their complaints before the consul; but the exercise of the fullest liberty to do so, when interpreted reasonably, is consistent with the master's being allowed fairly to exercise some discretion as to the time and mode of landing, and as to the prosecution of the work of the ship. Certainly, the refusal of the crew to obey the orders of the master is not the first step to be taken, on the instant, when this right to see the consul is claimed. Such a refusal may be justifiable, when absolutely necessary to prevent the loss of the right; but I think very bad consequences would follow from admitting that anything else would justify it. As long as the obligations of the master, to allow the crew to lay their complaints before the consul, and of the crew to obey his orders and do their duty on board, can be reconciled, they must be; and I see nothing in this case which made the latter inconsistent with the former.

But, in my judgment, the claim of the crew to see the consul, and their refusal to do duty until they should see him, cannot be supported by this act, because their complaint was not one which the act was designed to enable them to lay before him.

It can hardly be supposed that congress intended to (77) secure to the crew the fullest liberty to apply to the consul concerning any matter or thing, which they or any of them might desire to complain. Some practical result of such complaint, by means of some jurisdiction of the consul over its subject matter, must be considered to have been the purpose of this provision of the act.

To secure the crew the right to land, or to impose on the consul the duty of immediately repairing on board, merely that he might hear and do nothing, because he had no power to do anything, cannot have been intended. Nor is any such intent indicated by the language of this law. It says, "to lay their complaints before the consul," etc. What complaints? This question is answered by the act, which provides, in clause nine, for a complaint by a mariner to a consul, that he is detained contrary to his agreement, or after he has fulfilled it, and which directs how the consul is to inquire into the truth of the complaint, and what he may do if he finds it well founded; and by clauses twelve to fifteen, inclusive, which authorize a complaint to the consul concerning the seaworthiness of the vessel, and point out what proceedings shall be had, and what jurisdiction shall be exercised by the consul upon such complaint. When, therefore, the next clause says the crew shall have the fullest liberty to lay their complaints before the consul, the natural meaning is, the com-

plaints which, by this act, they are authorized to make, and he required to hear; and this meaning is made quite plain by the concluding words of this clause, which require the consul (in case the crew cannot land) to repair on board, and "inquire into the causes of the complaint, and proceed thereon as this act directs." If he is to do this when he goes to them, I presume he is to do the same when they come to him; and, if so, it necessarily follows, that the complaints which they have, by this act, a right to lay (78) before him, are complaints upon which the consul can "proceed" as this act directs. Not that they must be well founded, in part or in whole, but that their subject matter must be such that, if well founded, the consul, by this act, has authority to proceed thereon.

Now I do not find in this act, or elsewhere, that power is confered on a consul of the United States to take cognizance of a complaint by a part of the crew, that the mate had threatened to beat out their brains with a hand spike, followed by an appeal by the mate to the principal party in the quarrel, desiring him to think no more about it; or, to state it more abstractly, I do not find that a consul has power, upon the application of the crew, to inquire into quarrels of this nature. The only approach towards such a case is in the seventeenth clause of the act, which is in the following words: "In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged," etc. It is to be born in mind that this is a new power, conferred on the consul for the first time; that it is a power to dissolve a contract, or rather, authoritatively and finally to declare that it has been so far broken by one party that the other party is no longer under obligation to perform it; that this is a very high power, and, consequently, is not to be extended to a case not fairly within the words of the act, which apply only to a particular class of cases, where deserters are apprehended, and the desertion was caused by unusual or cruel treatment; and fall far short of cases like this, where, at the worst, only threats have been uttered.

I am clear, therefore, that the refusal of the men to do duty can find no justification in this act; that this reference, especially after the mate had asked the principal (79) party to the quarrel to think no more about it, is strong evidence of an insubordinate temper, and justified the master in applying to the consul. That he did so apply, I am satisfied; his answer so states; and though an answer has no technical effect as evidence, it is not wholly without weight in considering his conduct. There is nothing in the case tending to contradict this allegation in the answer, and the certificate of the con-

sul, which is made evidence in the case, proves such application to him. Being satisfied, then, that the master did apply to the consul, and that he had, in point of fact, a case to lay before him, in which five out of seven of his crew, after a fight between one or more of them and the mate, had unjustifiably refused to do duty on board, I do not think it reasonable to doubt that he did lay this case before him, as he swears in his answer, especially when the consul certifies that on that day he acted officially, on the very ground that these men had refused to do duty on board. Nor can I come to any other conclusion than that the interposition of the local authorities was by the procurement of the consul. It is true the men both testify that the consul did not see them on that day; but so far as this tends to show that the consul did not interpose at all on that day, it is directly met by the answer, which says that the consul himself sent the officer, who removed the men from the vessel, and the consul's certificate declares, in so many words, that he ordered the men to be imprisoned for safe keeping, in the Royal Prison. I must consider the imprisonment of these men, therefore, as an act of the local authorities, done upon the request of the consul, by reason of information given him by the master, that the men had unlawfully refused to do duty on board. And the question is, whether the master is responsible for their imprisonment, as for a tort. Prior to the Act of Congress of the 20th (30) July, 1840, it had repeatedly been decided,[1] that a master could not lawfully imprison a seaman on shore, unless he were unable to restrain him on board; that a case of urgent necessity must be made out; and that, although it would be a mark of good faith, on the part of the master, to take the advice of a consul, as being a person confided in by the government, for many purposes, yet such advice would not be otherwise operative to protect the master, because consuls had no power or duty in reference to the matter. I am satisfied of the correctness of these decisions, but I think the Act of 1840 has materially changed the relation of consuls to this subject. The eleventh clause of the Act is as follows: "It shall be the duty of consuls and commercial agents to reclaim deserters, and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end, in the most effectual manner." This certainly confers on consuls authority, and in strong terms makes it their duty, to employ the local authorities, to discountenance insubordination, where they can be usefully

[1] United States v. Ruggles, 5 Mason, R. 192; Jay v. Almy, 1 W. & M. R. 262; Wilson v. Brig Mary, Gilpin, R. 31; Magee v. Ship Moss, Gilpin, R. 219; The Nimrod, Ware, R. 9; The D. Patt, Ware, R. 503.

employed for that purpose; and, by a necessary implication, the consul must judge and determine, whether any particular case is one in which they may usefully be employed. Certainly his decision is not final. If he is guilty of any malversation, or abuse of power, the eighteenth clause of this Act makes him liable to any injured person for all damage occasioned thereby, as well as to be punished criminally. But I think it was (81) the intention of the Act to intrust him with power officially to invoke the aid of the local authorities, subject always to a just responsibility for any abuse of this power. If the local authorities are to be used, it is a reasonable not to say necessary inference, that they are to act in such manner, and by such means as they ordinarily employ; and the most common and obvious means are the use of a place of confinement, under the control of the local government. The power, in the most effectual manner to lend their aid, and use their exertions to employ the local authorities to discountenance insubordination, can hardly be said to be exhausted, while the means most usually employed by those authorities have not been used. I think, therefore, that this Act conferred upon consuls the power, and made it their duty, where the local authorities can, in their judgment, fairly exercised, be usefully employed to restrain a part, or the whole, of a crew, who are in a state of insubordination, to use their exertions to that end, in the most effectual manner, and that this restraint may be exercised by confinement on shore, in such place as is ordinarily used by the local authorities for similar purposes. And further, that the consul, in so doing, acts as a public officer, upon his official responsibility, intrusted with the power to judge in the first instance, of the propriety and fitness of so doing, and subject to his responsibility to any injured by an abuse of his power.

The reasons which have led courts to determine that it was not one of the ordinary powers of a master to imprison his men on shore, do not exist, or apply with greatly diminished force, to the action of a consul in that behalf, on the information of the master. A public officer is thus interposed between the master and the seaman, who is to act under his official responsibility to the government, whose servant he is, as well as to the party who is affected (82) by his act; he is a resident at the place, and cannot sail away, and leave the man to suffer or die in a foreign prison. He is intrusted by law with the care of destitute seamen, and with their return to their own country. It is to be presumed that he will have a due regard to the safety and rights of all, and, while he discountenances insubordination, by every means in his power, that he will not employ the local authorities in a way to oppress the seamen of the United States. But

whatever may have been the reasons which operated to produce this law, I think it has conferred on consuls the power above described. If this be so, it is quite clear that the responsibility of the master is modified. If the consul may judge when the local authorities may usefully be employed, it would be a great hardship to hold the master responsibile for a mere error of judgment of a public officer, in whose appointment he had no voice, and who is in no just sense his agent. At the same time, if the consul acts on the application of the master, the master is not free from responsibility. In the first place, he is bound to represent the case truly to the consul, and, in the next place, the case must be such that he, as a reasonable man, can honestly believe it to be within the power of the consul. If he knows, or ought to know, that it is not a case in which the local authorities should be appealed to, or in the words of the act, in which they can be usefully employed, then he necessarily knows that the case is not within the limited power of the consul, and that, consequently, he cannot shelter himself under his authority. But if the master represents the facts truly,—if the facts are such that a competent master might well believe that the local authorities might be usefully employed, and the consul so considers, and applies to them, and they, at the consul's request, take the men on shore, and there confine them, in the place and manner usual at (83) such port, I think the master is not guilty of any tort, although, upon a review of all the facts, the court might be of the opinion, that it was not strictly necessary to remove the men from the ship.

Applying these views to this case, I find no evidence that the master misrepresented the facts to the consul, and I am not able to come to the conclusion that the case was of such a nature that the master ought to have known that the local authorities could not usefully be employed in the way they were employed. Five out of seven of his crew had unlawfully refused to do duty; they had been appealed to by the mate, who alone had given them any cause of complaint, in a manner calculated to allay any apprehensions which they might have entertained, but they still refused. Each had been required, by the master, to return to his duty, and each had distinctly refused.

The deserter who was on board could hardly be relied on for any very effectual assistance, and one officer, and one man, and a boy, were all that were left; under these circumstances, some masters might, and probably would, have reduced these men to obedience, on board the ship; but I cannot say that it was a case where the master ought to have known that that was the only proper course, and therefore I am of the opinion that the master is not responsible for a tort by reason of their imprisonment. Nor do I think he incurred that

responsibility by their remaining in prison. It is quite clear that he was anxious to have them return to their duty, and gave them early and repeated opportunities to do so. They steadily refused, alleging that they were afraid for their lives, if they should return on board. If five able-bodied men really had such fear of the master and mate, who alone had shown any disposition to injure them, simply because of some threats uttered in the heat of blood, it seems to me to have been an (84) unreasonable fear. It is observable that neither of the libellants asserts, in his libel or his testimony, that he did really entertain such fear. Their justification for their refusal to return to the ship resting solely on this fear, I think they should have pleaded it as a fact, and sworn to it as a fact, and not allowed it to rest solely on their statements at the time, which do not seem to have had a reasonable foundation in the occurrences as they detail them.

After they had been in prison some days, the answer says eight days, and after repeated refusals to go on board, or do any duty if forced on board, the consul discharged them from the vessel, the master shipped other men in their place, paid to consul fifty dollars for their passage money to the United States, and one hundred dollars more for expenses arising out of their arrest, and board in prison, and from that time the answer avers that the master had no control over, or connection with them, and that whatever was done, was by the consul alone. The Act of 1840 empowers consuls, upon the application of the master and any mariner, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. I do not understand, from any of the proofs, that these men applied in terms for their discharge; but I think their unjustifiable refusal to go on board, or do any duty if forced on board, would enable the consul to act upon the request of the master, and discharge them, and the men themselves evidently considered that they had in effect requested their discharge, for they have made no claim to be paid any wages. After they were thus discharged, I consider the consul, and not the master, responsible for their further detention. They no longer formed part of his crew; he no longer sustained any relation to them. The answer declares he did nothing to cause their further detention, and there is not sufficient proof to the contrary.

(85) I am of opinion, therefore, that the responsibility for their futher detention must rest with the consul by whose orders they were originally put in prison, and at whose sole instance they were kept there, after they were discharged from the bark. The answer states, that the consul said something to the master about sending them home to be tried; and if he considered it his duty to detain

them, by aid of the local authorities, that he might send them to the United States for that purpose, his conduct might be justified. On any other ground it was grossly improper; for he had no right to punish them by imprisonment; and surely, destitute seamen are not to be provided for by a consul by keeping them in a foreign jail.

There is one other cause of action set forth in these libels, which requires to be distinctly considered. It is, that the men were sent to the jail without any clothing or bedding, which was detained on board the bark, and finally sold by the master. It is in proof, that the libellants slept on the flagstones, using their boots for pillows; and that, during all the time they were in prison, they had no clothes except the working dress in which each was when taken on shore. This detention of their clothing is not justified; and no excuse is attempted, except that the answer alleges that the consul told the master their clothing was forfeited. But it does not appear when this information was given, and it is difficult to see how it could have been supposed to be correct. Before the men had finally refused to return on board, and while it was yet uncertain whether they would return, there could be no pretence for treating them as deserters; and when it became certain that they would not voluntarily return, they were regularly discharged, and desertion became impossible. I consider it to have been a breach of duty by the master, and a wrong to these men of a somewhat aggravated character, to detain all their (86) clothing from them during eight days, and then sail away and finally deprive them of it. I shall therefore allow to each the pecuniary value of his clothing, together with the sum of eight dollars, for special damages, arising from its detention while in prison. From analogy to the rule followed by Judge Hopkinson, in the case of The Maiden, Gilpin's R. 294, I should deduct a proportional part of the prison fees and expenses and the cost of shipping the new men, if I did not consider that the wages remaining unpaid to each of these men at the time of their discharge was just about a fair compensation for their proportions of these charges; and it seems to me that, under the circumstances, it is just that the ship should neither lose nor gain by their discharge. It is not easy to affix a value to the clothing of each libellant. It is sworn to be worth from eighty to one hundred dollars for each; and the answer puts it at very much less sums. Upon the best judgment which I can form, I think the sum of forty-eight dollars will be a just allowance for the clothing and the special damage of each. This sum is therefore awarded to each libellant. I do not allow any costs of the appeal to either party. The decree of the court below will be modified accordingly.

I desire to add, that it is stated at the bar, that the evidence upon which the appeal has been heard is not identically the same as in the district court; and that several of the questions which have now been decided were not there raised.

JOSEPHINE, THE, (1801, Great Britain—U. S.)
4 Rob. C. 25.
Sir William Scott, High Court of Admiralty.

(26) (Extract) These instructions, it seems, were not literally executed on the part of Mr. Gelston. He though it better on account of his own inexperience, to apply to Mr. Shipwith, who was the American consul at Paris; but who is to be taken nevertheless as a French merchant in such a transaction; since there can be no doubt, that, notwithstanding his consular character, he is to be considered in all commercial transactions on the same footing as any other resident merchant in France, to whose experience and prudence Mr. Gelston might apply, for counsel and assistance in the management of this cargo.

KAINE, IN RE, (1852, U. S.—Great Britain)
14 How. 112.
Catron, Supreme Court.

[Speaks of Robbin's case in which the judge at the president's direction ordered as follows: "I do therefore order and command the marshal, in whose custody the prisoner now is, to deliver the body of said Nathan Robbins, alias Thomas Nash, to the British consul, or such person or persons as he shall appoint to receive him."

Justice Nelson discusses the inconvenience of allowing such extended rights to consuls and subordinate officials. J. Taney concurred with his (Nelson's) opinion.—ED.]

(136) (Extract) In the case before us, her Britannic majesty's consul at the port of New York made a requisition and complaint, before one of the United States commissioners, against the fugitive in question—upon which, a warrant was issued and the arrest made, and, after an examination into the charge, committed, for the purpose of being surrendered. No demand was made upon this government, by the government of Great Britain, claiming the surrender. This government was passed by , and the requisition made by the consul, directly upon the magistrate, on the ground, as contended for, namely, that the consent or authority of the executive is unnecessary to warrant the institution of the proceedings; and in support of their propriety and regularity, the position is broadly taken, and without

which the proceedings cannot be upheld, that, according to the true interpretation of the treaty, any officer of Great Britain, however inferior, properly represents the sovereign of that country, who may choose to prosecute the alleged fugitive in making the requisition, and is entitled to the obedience of the judicial tribunals for that purpose, and if sufficient evidence is produced before them, to arrest and commit, that a surrender may be made; and, that in this respect, such officer is put on the footing of any of the prosecuting officers of this government, who are (137) authorized to institute criminal proceedings for a violation of its laws; that the country is open to him, throughout the limits of the Union, and the judicial tribunals bound to obedience on his requisition and proofs, to make the arrest and commitment. This is the argument. Now, upon recurring to the terms of the treaty it will be seen, I think, that no such stipulations were entered into, or intended to be entered into, by either government, or any authority conferred to justify such a proceeding.

KAMMERHEVIE v. ROSENKRANTS, (1822, Great Britain—Sweden)
1 Hag. Adm. 62.
Lord Stowell, High Court of Admiralty.

[Question of payment of wages by holders of a bottomry bond. "Upon affidavit, with a schedule of wages due to the crew, and with the consent of the master, and a certificate of the Swedish consul annexed."—Ed.]

KELLY v. THE TOPSY, see The Topsy.

KENNEY v. BLAKE, (1903, U. S.)
125 Fed. Rep. 672.
Morrow, Circuit Court.

[Affirms The Troop 117 Fed. Rep. 577.—Ed.]

KENT v. BURGESS, (1841, Great Britain)
5 Jur. 166; XI Simons 361.
Vice-Chancellor, Vice-Chancellor's Court.

[Marriage made by protestant clergyman—seems to involve no consular question. Marriage was made in presence of consul.—Ed.]

KESSLER v. BEST, (1903, U. S.—Germany)
121 Fed. Rep. 439.
Lacombe, Circuit Court.

(439) (Extract) Motion to compel a witness to answer cross-

questions. He is being examined here under section 863 (U. S. Comp. St. 1901, p. 661); the action—for libel—being at issue in the United States circuit court for the Eastern District of Wisconsin.

Herbert R. Limburger, for the motion.
Jno. Brooks Leavitt, opposed.

LACOMBE, Circuit Judge. The witness claims that the documents about which he is interrogated are part of the archives of the German consulate, and therefore privileged. The objection is well taken, but defendant cannot be allowed to retain so much of the direct examination as deals with these same documents. The passages marked in blue are therefore stricken out of the direct. It is difficult to understand upon what theory the rest of the direct could be admitted, except, perhaps, to the extent that witness put stamps on four bottles of wine, and delivered them to the shipbuilding company. Conversations between Dingwell and Downey on the one side, and the secretary of the German consulate on the other, at which plaintiff was not present, seem to be manifestly incompetent against him. However, that is a question to be settled by the trial court. This court deals only with the question of privilege.

(January 10, 1903.)

Memorandum on settlement of order sustaining the refusal of the witness Theodore Jakel to answer certain questions, and directing that certain answers already made by him should be struck from the record:

LACOOMBE, Circuit Judge. The memorandum submitted on behalf of the defendant has been carefully considered. The court's understanding of the matter is that upon the hearing counsel for the German government asked, not only that the witness be excused from answering certain questions with regard to documents belonging to the German consulate, on the ground that they were privileged by statute and by treaty, but also that some answers which the witness (440) had already incautiously made, purporting to give the contents of part of such documents, should also be stricken out. The "privilege" was that of the German government, not of the witness, and inasmuch as the witness attended under the compulsion of the subpœna issued out of the circuit court, Southern District of New York, and answered under constraint of an apprehension of commitment by the same court, should he refuse, it was assumed to be within the power of this court to strike out any part of the testimony which violated the "privilege" of the German government.

In order that the situation may be presented to the circuit court in Wisconsin precisely as it is, the examining officer will certify the record which was before this court on the motion, and also the order now signed. It is thought that the result will be the same, whichever court disposes of the question, because of the manifest unfairness of allowing a party to avail himself of part of a "privileged" document which he has by chance got upon the record, when the assertion of the "privilege" prevents his adversary from introducing the rest of the document.

KESTOR, THE, (1901, U. S.—Great Britain)
110 Fed. Rep. 432.
Bradford, District Court.

[Sect. 24 of the Act of December 21, 1898, forbidding the prepayment of sailor's wages, applies to a British subject shipping on British ship; there being no treaty to the contrary.—ED.]

KIDDERLIN v. MEYER, (1838, U. S.)
2 Miles 242.
Per Curiam, District Court of Philadelphia.

(242) PER CURIAM. (Extract) This is not a suit against the consul. And although in the progress of the cause, it may happen that the garnishee will be placed in the attitude of a defendant, yet even then, we do not think the constitution of the United States, or the act of congress referred to, can be legitimately permitted to interfere with the usual exercise of our jurisdiction. The act of congress must be restricted to cases in which the consul is made a defendant directly and originally,—to respond for his own debt or other liability. To put upon the act of congress the construction which is claimed here, would confer a privilege on the proper defendant, rather than on the consul.

Motion denied.

KOPPEL v. HEINRICHS, (1847, U. S.)
1 Barb. 449.
Harris, Supreme Court of New York.

(450) HARRIS, J. That the constitution of the United States has conferred upon the federal courts exclusive jurisdiction of suits against foreign consuls is not denied.

But the question now before the court relates to a suit commenced in a state court, before the party claiming exemption as a consul received his appointment, and when the state courts had jurisdiction

of the suit, exclusive of the federal courts. That the suit was rightfully commenced in the New York common pleas, is admitted: and the question now presented for determination is, whether the subsequent appointment of Heinrichs as consul of a foreign government deprived the state court of the jurisdiction which it had thus rightfully acquired; (451) or whether, having thus obtained jurisdiction, it was competent for the state court to proceed to consummate its proceedings, notwithstanding the privilege conferred upon the defendant by virtue of his subsequent appointment. The general rule on the subject of jurisdiction is that it depends on the state of things at the time the action is brought; and if the circumstances be such, then, as to vest jurisdiction , the same cannot be ousted by any subsequent event. (Mollan v. Torrance, 9 Wheat. 537.) If there can be said to be any exception to this rule, it is when such a change in the parties takes place after the commencement of the suit as to work an abatement. It was insisted by the counsel who argued this motion for the defendant, that the appointment of the defendant as consul had the effect to abate the suit; that thereby he was withdrawn from the jurisdiction of the state courts. But I cannot concur in this view of the question; whether the privilege conferred upon consuls by the constitution and law of the United States is to be regarded as a personal privilege, or the privilege of the sovereignty they represent. I do not think it was ever intended to extend that privilege so far as to enable a party, after a suit commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting an office which, if held at the time the proceeding was instituted, migh have been available as a valid objection to the jurisdiction of the court in which the suit was brought. No decision holding such a principle was referred to on the argument, nor do I feel called upon to adopt such a construction of the constitution and laws of the United States affecting ambassadors and consuls. Conceding that the exemption provided in behalf of these officers, is the privilege not of the person but of the state they represent, and that the provision is founded upon considerations of public policy, yet I cannot conceive that it is necessary, in giving effect to this provision, to violate the rule that the question of jurisdiction is to be determined by the state of things existing at the time the suit was commenced.

The case of Mannhardt v. Soderstrom (1 Binney, 138,) was much relied upon in support of the motion. But I cannot (452) regard that case as an authority to sustain the position assumed on behalf of the defendants. There the defendant, who was the consul general of the king of Sweden, accompanied his plea with a protestation that

"at and before the time of instituting the action he was, and
that time had continued to be, and still was, consul general, etc.
that therefore the court had not jurisdiction," etc. He then
his motion to quash the proceedings. It was shown, in oppos
to the motion, that in various instances the defendant had subm
to suits and executions from the state courts. Chief Justice T
man, in delivering the opinion of the court, said in reference to
defendant's having submitted to other suits, etc, that it was a
ficient answer to the objection that it did not appear on the re
that the defendant was a consul, and therefore the court could
no notice of it; but that in the case then before the court, it app
ing upon the record that the suit was against a consul, jurisdic
was taken away by the ninth section of the judiciary act. Thus it
be seen that the case relied upon is distinguishable from that
before the court, in two essential particulars: first, that the defend
was a consul when the suit was commenced; and secondly, that the
appeared upon the record.

Again; this suit was originally commenced in the New York c
mon pleas. It was removed into the supreme court by the defend
himself, who became the plaintiff in error. He occupies the posit
of one voluntarily bringing his suit in this court for redress. Sl
he be permitted, after failing in that suit, to have the proceedi
declared void on the ground of his privilege as an officer of a fore
government. Jurisdiction of state courts in suits in which fore
consuls are parties, is excluded only in suits against them. They
still at liberty, if they choose to do so, to bring suits against ot
persons, in state courts. It seems to me, therefore, that even thou
the defendant's appointment might have furnished sufficient grou
to arrest the proceedings in the common pleas, where he was a
fendant, he does not stand in the same position in the court to wh
he has voluntarily and rightfully applied for (453) the purpose
correcting what he deemed an error in the court below. By th
calling upon the supreme court for its decision upon the merits
the cause commenced against him in the common pleas, he admitt
its jurisdiction to make that decision; and whatever might have be
his rights in the court below in respect to his appointment as cons
he should be deemed to be concluded in this court by his admissi
of its jurisdiction, in bringing his writ of error here.

I am also inclined to think that even if the appointment of t
defendant as consul, after the suit had been commenced against hi
could have been made available to deprive the state court of the juri
diction it had acquired, yet the objection could only have been prope
ly made by plea, or perhaps upon motion, before proceeding in t

cause; and that having neglected to avail himself of his exemption before proceeding to the trial upon the merits, he precluded himself from afterwards objecting to the jurisdiction of the court. But it is unnecessary to decide this question. It is enough that when the suit was commenced, the federal courts had no jurisdiction either of the defendant or the subject matter of the suit, but that jurisdiction of both belonged exclusively to the state courts; that the suit was thus rightfully commenced in the New York common pleas; that after the appointment of the defendant to the office by virtue of which he now claims exemption, he proceeded not only to a trial on the common pleas upon the merits, without suggesting to the court his privilege, but also brought his writ of error to the supreme court to review the decision of the common pleas. Under these circumstances, he must be deemed to be estopped from setting up his privilege in bar of the jurisdiction of the state courts, if, indeed, he ever had such right. The motion must therefore be denied, with costs.

LA BLACHE v. RANGEL, See The Nina.

LADY FURNESS, THE, (1897, U. S.—Great Britain)
84 Fed. 679.
Tenney, District Court.

(680) (Extract) Actions of this character should not be encouraged. Shipowners have rights, as well as sailors, and the rights of each should be respected and upheld by the courts. The contract was signed and entered into by the libellant, and I fail to see any good or sufficient reason for his breaking the same and deserting the ship.

It is urged, however, that the court should not entertain jurisdiction of this case. Even the British consul at the port of New York has requested this court "not to exercise jurisdiction." It will not be disputed, I apprehend, that the matter of jurisdiction, in a case like the one at bar, is very much in the discretion of the court. This **(681)** case has been tried, and it seems to me that time and expense, and perhaps further litigation, will be saved by this court taking jurisdiction in this case, which it does, notwithstanding the courteous letter of the British consul to the contrary. The libel is therefore dismissed, with costs. Let a decree be entered accordingly.

LAMB v. BRIARD, (1848, U. S.)
Abb. Adm. 367; Fed. Cases 8,010.
Betts, District Court.

This was a libel *in personam,* filed by James Lamb against William A. Briard, master of the ship Far West, to recover wages.

The libel stated that the respondent shipped the libell steward, on board the Far West, in February, 1848, at New C for a voyage to Europe and thence back to some port in the States, at $20 per month; that shipping articles were signed libellant entered upon the service of the ship, February 10, about which time she (368) sailed for Europe; that on the arrival vessel at Harve, the mate sent the libellant on shore to prison, a his release from prison the master, having hired a new stewa fused to permit him to return to his duty on board ship; that lant applied to the American consul for redress, and being inf by the consul that the master was very vindicative against hi quitted the ship, which soon after sailed, leaving him at Havre, he was detained at his own expense, three weeks. The libel cl to recover wages for the entire voyage, and the expenses incurr him at Havre, amounting in all to $51.35.

The answer stated that on the outward voyage, and whil ship was in port at Havre, the libellant was disobedient, interf at the last in a turbulent manner to prevent the discipline o ship from being carried on; that he was, on account of this con put in prison; that the respondent immediately thereupon laid the before the American consul, who took the case wholly into his h caused the libellant and other disobedient members of the cre be brought before him, and reprimanded them and ordered the return to their duty; that they all did return, except the libel who requested his discharge; that the respondent consented to hi ing discharged, and that the consul certified the libellant's disch on the shipping articles, paid him his wages, computed at $20.86, took his receipt for that sum in full.

The shipping articles, the receipt given by the libellant, and certificate of discharge, were produced and duly proved upon hearing.

Alanson, Nash. for the libellant.

F. S. Stalknecht, for the respondent.

1. The consul had full power to discharge libellant in Ha The act of 1840, (ch. 48, § § 5 and 6,) gives discretionary powe consuls to discharge a mariner at a foreign port, upon the app tion of master and mariner.

2. All the requirements of the act were complied with by (8 the consul. The consul, Jones, and the second mate testify libellant requested to be discharged. It is also admitted that spondent subsequently united in the request, assigning as rea therefor that Lamb was incompetent, insolent, and disobedient.

proper entry was also made upon the list of the crew and the shipping articles.

3. The discharge was, therefore, *prima facie* right and proper. But it will be sought to set it aside on the ground that Lamb was coerced to ask for his discharge by being imprisoned, and by a threat to bring him home in irons. Doubtless he was induced by these considerations to wish to leave the ship; but if the imprisonment was proper, and caused by his disobedient and mutinous conduct, and his discharge was necessary to preserve the discipline and safety of the ship, this court will uphold it. "Discharges given with due deliberation and full explanation of circumstances, should not be set aside on light grounds." Thorne v. White, 1 Pet. Adm. R. 178. Final discharges and compromises, on due consideration, should be upheld. Per Peters, J., in Harden v. Gordon, 2 Mason, 561. The cases all concede that the right to imprison exists though there must be sufficient cause. Abbott on Shipp. 179. In the United States v. Ruggles, (5 Mason, 192,) it was decided that in case of mutiny the right to imprison exists.

4. A review of the facts in this case shows that the imprisonment of the libellant was not only justifiable, but necessary.

5. As to the libellant's claim for his expenses in Havre, there is no proof of the time he was there, or of the amount of his expenses. The presumption is that he shipped on board of another vessel, as he assured the consul he could easily obtain another ship.

6. A distinction is also made in the books between the power to discharge a seaman and a steward. In the case of Black v. The Ship Louisiana, (1 Pet. Adm. R. 268,) (370) it was decided that if a steward is found to be incompetent, the master can discharge him. It is in evidence that Lamb was not only insolent and disobedient, but also incompetent to discharge his duties as steward.

7. Further, the general principle of maritime law is, that a seaman may forfeit his wages by gross offences. Lamb certainly was guilty of gross offences, such as constitute a forfeiture.

BETTS, J. The suit is obviously an experimental one, seeking to establish a right to wages upon the testimony of two shipmates, against the official acts of the United States consul at Havre, certifying the discharge of the libellant to have been by mutual consent on his part, and on that of the master of the ship, and with the approval of the consul.

Previous to the act of 1840, a seaman who deliberately and voluntarily took his discharge from a vessel in the course of the voyage, lost all claim to a continuance of wages, and the courts were disposed

to countenance such discharges when it appeared that there w reasonable grounds for them. Harden v. Gordon, 2 Mason, 5 Thorne v. White, 1 Pet. Adm. R. 178. The act of February 28, 18 however, in cases of discharge of seaman abroad, by mutual conse compelled the master to pay the consul at the port three mont wages, as an indemity to the United States against the support the seaman and his passage home. The act of July 20, 1840, (§ arts. 5 and 6,) conferred upon the United States consuls pov to discharge absolutely mariners from vessels, on the joint applicat of both the master and the men, without requiring payment of th month's wages, when in the judgment of the consuls, it was expedie or the consuls were authorized to impose such terms for the indem of the United States, as they might deem proper.

The evidence is full to show that in this case the consul pers ally examined into the matter. He had the master (371) with libellant and others of the crew before him, and decided that libellant might be discharged. This was accordingly done—both own consent and that of the master being also given. A certific of the fact that the libellant was discharged by his own consent entered upon the articles under the hand and seal of the cons who, moreover, gives his testimony on deposition to the same effect. is further proved, by the assistant of the consul, that the respond paid into the consulate $20.86, the balance of wages due the libella and that the libellant received the money and signed a receipt the fore, therein stating, also, that he had been discharged at his own quest, and with his free will, and that the sum paid was in full the wages due him, and of all demands against the ship.

This receipt is annexed to the commission, and is authenticat by the consular seal, and proved by the deposition of the assistant.

This is evidence of the most satisfactory character, that t rights of the seaman were duly cared for and protected, and it lieves the court from all those doubts which not unfrequently ha over the propriety of discharges abroad, granted at the instance mariners alone.

Manifestly, congress had in view the importance of placing ov the conduct of masters and sailors the supervision of a public fun tionary, who should control these matters in subordination to the int est of the mariner and of the United States. This is also regard as a sufficient check to improvident discharges, without the penalty three months' wages being imposed. The actions of consuls und the provisions of the statute are, therefore, if not absolutely conclusi as to the facts that the discharge was by the consent and free wi of the mariner and to his benefit, at least of force to overbalance t

mere assertions and opinions of shipmates and other bystanders, however numerous they may be. In- (372) deed, it is doubtful whether evidence could be received on the part of the libellant, impeaching the validity of the certificate and official act of the consul, unless it amounted to a proof of fraud or plain dereliction of duty on his part.[1]

It is unnecessary to consider the question which was raised by the consul, upon evidence tending to show that the seaman was induced to consent to his discharge by the threat of the master and consul that he should be brought home in irons—viz., whether the application of a sailor for discharge under the apprehension that he was to be subjected to imprisonment and hard usage on shipboard, when innocent of any offence, might be regarded as negativing his free consent to the discharge. For in my opinion, there is *prima facie* evidence in this case sufficient to justify the master in confining the libellant and bringing him home as a mutinous and insubordinate seaman. And, furthermore, in my judgment, the decision of the consul, rendered upon an inquiry made on the spot into the allegations on both sides, and in the presence of the parties, must, in a fair interpretation of the act of congress, be regarded as final in this particular, unless the conduct of the consul be shown to have been corrupt or fraudulent.

The mischiefs of the old system were, that men were often compelled by the severe conduct of the master, or seduced by his connivance, to abandon the vessel abroad, to the great injury and oppression of the seamen themselves, and under circumstances tending to deprive the United States of their after services; and also that seamen were often kept on board in violation of their shipping contracts. The act of 1840 interposed the official supervision of consuls in the matter, referring it to them to determine when a seaman might be released from the vessel, on the mutual consent of himself and the master, and in what cases he might be entitled to a discharge because of the violation of the shipping contract on the part of the master.

The statute has provided no means of reviewing the determination of consuls in these matters, either on behalf of seamen or of masters, and accordingly they must be considered final, unless given under circumstances rendering them void *in toto*.

I hold, in the present case, that there is no foundation for the action, and that the libel must be dismissed with costs.

Decree accordingly.

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[1] In respect to the requisites of a valid consular discharge and certificate, see The Atlantic, decided February, 1849, and reported *post*, in order of date.

LANFEAR v. RITCHIE, (1854, U. S.—Sweden)
9 La. Ann. 96.
Ogden, Supreme Court of Louisiana.

(Syllabus) On the death of a subject of the king of Sweden, an a istrator of his succession was appointed, whom the Swedish vice-consul soug supercede. Held: the right claimed is not sustained by any law, or treaty ulation.

[J. Lathrop said in re Wyman that this case was decided a time when we might expect the doctrine of state rights t strongly insisted upon."—ED.]

LAS CAYGAS v. LARIONDA'S SYNDIC, See Caygas.

LEAVITT v. UNITED STATES, (1888, U. S.)
34 Fed. Rep. 623.
Brown, District Court.

Consul's claim for reimbursement.

BROWN, J. On the 17th of August, 1887, Humphrey H. Lea the petitioner above named, filed his petition in this court pursua the (624) provision of the act of March 3, 1887, (24 St. at Larg 359, p. 505,) to recover of the United States the sum of $72, all to have been expended by him in January, 1885, as the United St consul in Nicaragua, by the direction of the department of stat procuring certain articles for the World's Industial Exposition New Orleans. A copy of the petition was duly served upon United States attorney, and sent to the attorney general, as dire by the said act. The United States district attorney appeared defended, and the cause was tried before the court without a jury required by section 2. I find the following facts:

FINDING OF FACTS.

(1) That the petitioner was the first appointee of the sulate at Managua, Nicaragua; that he qualified in August, 1 arrived at Managua in the latter part of September of that year, thereupon entered upon and performed the duties of his consul until relieved by his successor in 1886. (2) In December, 1 he received, inclosed in a dispatch from the department of state, following circular letter:

"CIRCULAR

"DEPARTMENT OF STATE

"WASHINGTON, D. C., November 17, 188

"*To the Consular Officers of the United States*—Dear Sirs: Referrin

the previous circulars issued from this department respecting the contributions requested on the part of the consular corps in behalf of the World's Exposition, I have the pleasure, in behalf of the department, to express appreciation of the very general response in reply thereto. It seems, however, that some of the consuls have construed the request to be of a more extended nature than intended, and have hesitated in action because means and time seem not to justify the effort to obtain a large number of contributions, or articles of importance and bulk. There is ample time, but the appropriation is an act of congress. I beg to suggest that a souvenir which may characterize the industries or peculiarities of the consulate will be most acceptable, even though of the smallest degree, or in minute shape, if appropriate and attractive; and it is not desired that consuls should depend upon voluntary contributions. It gives me pleasure, also, to advise that the inauguration of this grand enterprise will not take place until the 15th of December; and, lasting as it does until the 1st of June, 1885, there is ample time for every consul to forward some striking representation; in view of which fact, please ship by freight. I have the honor to be, dear sir, very respectfully yours, etc.,

"CHAS. S. HILL, Representative Department of State."

And that the petitioner did not receive any other circular or letter upon the same subject. The original of said circular letter is filed in the archives of the consulate at Managua. (3) That pursuant to the suggestion of the above circular letter, the petitioner, in January, 1885, purchased various articles characteristic of the industries and peculiarities of his consulate, of the value of $72, and paid therefor, which he at once forwarded addressed to Charles S. Hill, Representative of the World's Exposition at New Orleans, care of Houghwout Howe, U. S. Despatch Agent, New York, pursuant to previous instructions to that effect. (4) That the articles so purchased were received, and placed under the di- (625) rection of the department of state in the exposition at New Orleans, and that an award of merit was subsequently presented to the petitioner by said Hill, in the state department, for the exhibit thereof made. (5) That said Hill was duly appointed, and acted as representative of the department of state in the matters concerning the said exposition. (6) That in 1886, upon the petitioner's return from Nicaragua, the bill for the above articles was presented, with his accounts, to Mr. Sinclair, the chief of the consulate bureau, by whom he was referred to said Hill in respect to said purchase; that thereupon his account, with vouchers in triplicate, was made out and delivered to said Hill, as directed by him, by whom the petitioner was told that a check would be sent him for the amount as soon as the deficiency bill had passed; that the appropriation by the act of congress had been exhausted; and that they expected to pass a deficiency bill very shortly; that afterwards, in answer to a demand of payment, the following letter was received from the department of state:

"DEPARTMENT OF STATE

"WASHINGTON, August 11,

H. H. Leavitt, Esquire, No. 280 Broadway, New York—Sir: A copy letter of the 13th ultimo, relating to the articles furnished by you for exposition at New Orleans, has been sent to Mr. Hill, who was the repres of this department at that exposition. I am, sir, your obedient servant,

JOS. D. PORTER, Assistant Secret

(7) That by act of July 7, 1884, (23 St. at Large, c. 207,) there was an appropriation by congress "to enable the executive departments * * * to participate in the Worl dustrial and Cotton Centennial Exposition to be held at N leans," of various sums of money; among others, "for the st partment, ten thousand dollars." (8) That when the petit bill was presented for payment, in July or August, 1886, the appropriation had been exhausted. It does not appear at wh prior thereto the appropriation was exhausted; nor whether time the circular letter above mentioned was sent to the pet or was received and acted on by him, the amount of said app tion had been covered in previous orders.

Upon the foregoing facts, it is to be observed, that t section of the act of March 3, 1887, gives the court of claims j tion to hear and determine "all claims founded upon * * regulation of an executive department, or upon any contr pressed or implied, with the government of the United States damages, liquidated or unliquidated, in cases not sounding in respect of which claims the party would be entitled to against the United States, either in a court of law, equity, or ad if the United States were suable." Section 2 confers upon the States district courts concurrent jurisdiction "as to all matters in the preceding section where the amount of the claim does ceed one thousand dollars;" such causes to "be tried by the cou out a jury." Upon the facts above found, it is contended fense that the circular letter of October 17, 1884, does not pu direct or authorize consuls to make any purchases (626) charge of the United States; and, second, that if it does a such purchases it is not binding upon the government, bec department of state had no authority to authorize such a de contracted in the absence of appropriations therefor. Sectio and 3772 of the revised statutes in effect prohibit any expend contract in behalf of the government in excess of approp therefor, except in the war and navy departments, for speci poses. Bradley v. U. S., 98 U. S. 104, 112. I cannot doubt

proper construction of the circular letter of November 17th is that the consuls to whom it was addressed were desired to procure by purchase on account of the United States, to a limited extent, characteristic articles as souvenirs of their respective consulates. The circular says: "It is not desired that the consul should depend upon voluntary contributions." It ends: "Please ship by freight." The preceding paragraph says: "There is ample time; but the appropriation is an act of congress." The suggestion and the request, coming from the department of state, were practically equivalent to a direction or command. The reference to the appropriation as "an act of congress" would be altogether misleading if the circular had been intended by the department to be understood by the consuls as a request to pay for the articles out of their own pockets. Ten thousand dollars had in fact been already appropriated by congress for the especial use of the state department in this matter, as was presumably known to the petitioner. The subsequent treatment of the matter by the department, and by Mr. Hill, as its representative, also shows clearly that the expense of procuring such articles was not designed to be at the consul's personal charge. The expenditure made by the consul was certainly moderate; and it is not claimed to have been in excess of the "suggestion" or intent of the circular. In purchasing the articles the petitioner relied, and, in my judgment, had a right to rely, upon the construction of the circular, above given. Upon this transaction there was, therefore, an implied contract with the government to reimburse him for the amount paid; and the circular itself was also equivalent to a "regulation of an executive department" upon this particular topic, and within the first section of the act above stated, unless the department had no authority to make such a contract, or to issue such a circular at the time it was forwarded to the petitioner.

Counsel for the government contend that not only the sections of the revised statutes above referred to, but the various acts of congress authorizing government participation in the exposition, show at every step that the government was not to be bound, and that the various departments had no authority to bind it, beyond the precise sums appropriated. The principle is, doubtless, correct, (Bradley v. U. S., supra;) But the proofs, I think, are not sufficient to warrant its application as a bar of the petitioner's recovery in this case.

It is not claimed that the circular of November 17, 1884, and the petitioner's purchase of articles under it, were not properly within the appropriation of $10,000 for the state department made by the act of July 7th, unless the obligations already contracted were in ex-

cess of that sum. (627) There is no proof, however, as t amount of obligations contracted by the state department under appropriation before the circular was forwarded to the petitioner acted on by him. Mr. Hill had timely notice of the petitioner's chase, as appears by his letter as representative of the state de ment from New Orleans dated February 26, 1885. The things chased were received, not only without objection, but "with hi cere thanks in behalf of the department." In these circumst and in the whole proofs, there is no intimation that the purch these articles at that time made the expenditure run up in exc $10,000.

The authority to the department was a general authority the limit of $10,000. It was a general agency within that and for the purposes contemplated. The act of congress contem and provided for a multitude of acts and expenditures, not i aggregate exceeding that sum. Whether or not that limit had previously passed was a matter not possible to be known by the tioner, and even now scarcely ascertainable by him; but pecu within the knowledge of the principal, the defendant here. In a case, where the authority is general up to an assigned lim against a person dealing with the agent in good faith and wi means of knowledge, the burden of proof at least should be h be upon the principal to show that that limit had been passed, wishes to deny the authority of the agent upon that ground. I think are all the analogies of the law. Inasmuch, also, as se 3679 and 3772 of the revised statutes prohibit any department or lic officer from making any expenditure or contract in exc appropriations, a violation of these provisions of law is not presumed; certainly not a violation by the department of state, the fact affirmatively appears. The petitioner, upon receivin circular, was in no situation, as above stated, to question the aut of the department to issue it, or to authorize the desired expend It would have been a singular proceeding if, before acting upo circular, the petitioner should have endeavored to verify the a ity of the state department by an inquiry into the number and a of previous or contemporaneous orders. Such inquiries wou likely to be deemed meddlesome and insubordinate, and follow a speedy removal from office. He had a right to rely upon th sumption that the head of the department was acting withi prescribed limits of his authority. Under such circumstances, he brings suit for the moneys expended in pursuance of virtu structions, there is, it seems to me, special reason why the sam

sumption should prevail, until the contrary appears by proof of facts sufficient to show that, at the time when the orders were given and acted on, the limits of the agent's authority, i. e., the expenditure authorized by congress, had been passed. There is no such proof in this case. The circular and the request to the consul must, therefore, be deemed duly authorized at the time, and binding, as an implied contract with the government. The cases cited, in which the government has been held not bound, were where the appropriation was for a single specific purpose; and the contractor had full knowledge of the limitation. (628) Curtis v. U. S., 2 Ct. Cl. 144, 152; Trenton Co. v. U. S., 12 Ct. Cl. 147. The fact that the appropriation was found to be exhausted a year and a half afterwards, when the bill and the consul's accounts were presented for payment, does not constitute such proof. If authorized at the time it was issued and acted on, it could not be invalidated by the payment of subsequent charges or expenses to the extent of the appropriation. Trenton Co. v. U. S., 12 Ct. Cl. 147, 159. The mere fact that when the bill was presented for payment there was no appropriation remaining, is, therefore, no bar to the present action. Section 10 of the act of March 3, 1887, provides as follows: "From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree;" a specific recognition of the fact that a judgment may be rendered, in a proper case, although there is no present appropriation for its payment.

CONCLUSION OF LAW.

Upon the above facts the petitioner is entitled to judgment against the United States for the sum of $72, and $14.21 interest, amounting to $86.21, together with the costs provided by section 15 of the act of March 3, 1887 to be taxed. A stay of 60 days is allowed after service of a copy of this decision on the United States attorney.

LEON XIII, THE, (1883, Great Britain)
L. R. 8 P. D. 121; 5 Aspin. 73.
Brett, Court of Appeal.

[In this case besides suit for wages there was question of ill-treatment but on appeal it was held that the lower court made a proper exercise of discretion. Therefore this case contains nothing more than the "Nina" except as an example where the court refused jurisdiction in still more important circumstances.—ED.]

LEVEUX v. BERKELEY, (1844, Great Britain)
13 L. J. Q. B. 244; 8 Jurist 666.
Lord Denman, Queen's Bench.

[Concerning the swearing of affidavits in foreign countrie lows the case of ex parte Hutchinson.—ED.]

LEVY v. BURLEY, (1836, U. S.)
2 Sumn. 355; Fed. Cases 8,300.
Story, Circuit Court.

Where public officers are authorized by law to certify to certain fa certificates to these facts are competent evidence thereof.

A consul's certificate of any fact is not evidence between third per less expressly or impliedly made so by statute.

***Quaere,* if a consul's certificate is evidence, that a ship's register w ited with him, agreeably to the act of congress of 1803, ch. 62, sect. 2.**

An information was brought in the name of the consul of the Unite for the island of St. Thomas, suing for the benefit of the United States the defendant, to recover a penalty for not depositing with the co ship's register on her arrival at the port of St. Thomas, agreeably to t congress of 1803, ch. 62, sect. 2. Held, that the certificate of the co not admissible evidence, to prove the arrival or departure of the vessel.

***Quaere,* if a consul, who sues for a penalty, in his own name and pe for the benefit of the United States, is liable for costs.**

***Quaere,* if a party plaintiff of record, who has no interest in the competent witness.**

***Quaere,* if an information is the proper proceeding in the present ca the suit is not brought in the name of the government.**

This was a writ of error, to the judgment of the distri of the United States, for the district of Massachusetts. Th original suit was an information brought by the district atto the name of Nathan Levy, consul of the United States, fo land of St. Thomas, suing for the benefit of the United States. David Burley (the defendant in error), master of the ship F to recover the penalty of 500 dollars, for not depositing with consul, the ship's register on her arrival at the port of St. according to the requirement of the supplementary act, re consuls and vice-consuls, of the 28th of February, 1803, The defendant pleaded not guilty, upon which issue was joi a verdict passed upon the trial, in his favor. A bill of ex was taken at the trial; from which it appeared, that a certi the said consul (the plaintiff), under the seal of his consul offered in evidence, on behalf of the plaintiff, stating the fac arrival and departure of the ship, at the said port of St. Tho that the defendant, Burley, neglected and refused to de

register of the ship in the hands of the consul. The certificate being objected to, as evidence, the learned judge of the district court ruled, that the certificate was evidence, that the defendant Burley, did neglect or refuse to deposit the register with the consul, but that the same was not admissible to prove the arrival and departure of the ship from the port of St. Thomas. To this opinion, the plaintiff filed his bill of exceptions; and the question now presented to the court, was whether the certificate was admissible, for the purpose of proving such arrival and departure.

Mills, District Attorney, for the plaintiff, argued, that the plaintiff in the present case, not being liable for costs, was a competent witness, though a party to the record. No objection can be taken, because the certificate is not sworn to, as the consul is a public officer, acting under his oath of office. The district judge admitted it as evidence, that the register was deposited; but not of the arrival of the vessel. It would seem to be *prima facie* evidence of the arrival of the vessel, as con- (357) suls are ex-officio bound to take notice of the arrival and departure of American vessels. He cited, act of congress of 1803, ch. 62 § sect. 2.

Shipley, *e contra,* for the defendant, contended, that the plaintiff, being a party to the suit, was an incompetent witness, though not liable to costs. The statute makes it the duty of the consul, to prosecute in an alleged case like the present, but does not make him a competent witness. His certificate is not evidence of any fact, except what is within the consular functions. Church v. Hubbard, 2 Cranch R. 237; United States v. Mitchell, 2 Wash. C. R. 478; Catlett v. Pacific Ins. Co., (1 Paine R. 610.) The consular functions are enumerated in the statute. According to this, the consul is not bound to keep a record of arrivals. The ninth section of this statute, expressly makes his certificate evidence in certain cases. This express provision excludes the conclusion, that it is competent evidence, in cases not provided for. The statute, moreover, is a penal statute, and to be construed strictly.

STORY, J. The act of 1803, ch. 62 § sect. 2, provides, that it shall be the duty of every master of a ship belonging to the United States, on his arrival at a foreign port, to deposit his register, etc. with the consul or other commercial agent of the United States at such port; and in case of his refusal or neglect, he is to forfeit and pay 500 dollars, to be recovered by the consul or other commercial agent; "in his own name, for the benefit of the United States, in any court of competent jurisdiction." No provision is made, as to his certificate of the fact being evidence of such refusal or neglect, or of

the arrival, or of the departure of the vessel. But in another s of the act, (§ 4), it is expressly provided, that the certificate consul under his hand and seal shall be *prima facie* evidence refusal of the master of an American ship to receive destitute s on board, according to the requirements of that section. The r of law might, therefore, very properly be here brought into *Expressio unius est exclusio alterius;* and, certainly, an expres vision, in such a case, would not be without its weight in giv construction to such an omission, in a statute of this sort.

There is no doubt, that certificates and other documents by a public officer, entrusted with authority for that purpos to be treated as public documents, and as such, are evidence agai persons (to the extent of the officer's authority), of the facts, wh is directed to certify. But the difficulty in the application c doctrine to the circumstances of the present case is, that neithe statute, nor any other statute of the United States, has made duty of the consul to certify any such facts; and, therefore, th son fails. On the other hand, the general rule of law is, th evidence must be given under oath, and in the very case ir troversy. The exceptions to this rule are well known; and again, the difficulty is to bring the present case within the re any of these exceptions. I do not find, indeed, that any act o gress has required consuls to take an oath for the faithful perfor of the duties of their office, although, in common with all othe cers, they are required to take an oath to support the constitut the United States. So, that here, there is a certificate offere only not under oath, and not provided for by any statute, but o the grave objection, that it is not even by an officer, sworn faithful discharge of duty.

In addition to these suggestions, it is proper to state, tha not shown to be any part of the official duty of a consul tc a memorandum of the arrival or departure of American vessels from the port, for which he is appointed. If it were a part duty to do so, it would by no means follow, that his certificate fact would be evidence in a court of justice; for there would be evidence behind, that is to say, his own deposition on oath, the opposite party a right of cross- (359) examination. The c Waldon v. Coombe (3 Taunt. R. 162,)[1] shows, that the cert of a consul on a matter of fact, clearly within the line of his d not evidence. The case of Church v. Hubbard (2 Cranch R. shows with what strictness the law acts in relation to a co

[1] See also Roberts v. Eddington, 4 Esp. R. 88; Drake v. Marryatt, Cresw. 473, 476.

certificate. It was there rejected, as proof of the existence of a foreign written law annexed thereto. On that occasion, Mr. Chief Justice Marshall, in delivering the opinion of the Court, said, "There appears no reason for assigning to their (consuls) certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact." This language seems to me to justify the conclusion, that a consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly so made by statute; for it is in derogation of the rules of evidence of the common law. In the case of The United States v. Mitchell (2 Wash. C. R. 478), my late brother, Mr. Justice Washington (a truly able and cautious judge), admitted a consul's certificate to be evidence, that the ship's register was deposited with him; but he rejected it as to all other facts. I do not now meddle with this point; because it is not necessary to the decision of the case before the court; and there may be good reason to hold, that the certificate, in relation to an official fact, of which the consul may have exclusive knowledge, may be properly admissible, when, as to all other facts, it would be inadmissible; because they might admit of proof *aliunde*, or even of proof of a higher nature. If the certificate in this case had been of the positive deposit of the register, and were admissible as evidence of that fact (as Mr. Justice Washington held it was), then I should have no doubt, that it was *prima facie* evidence of the arrival of the vessel; for it would be a natural presumption, that it was deposited by (360) the master in the ordinary discharge of his duty. But where the certificate is merely negative of the non-deposit, of the register, it would seem at most to establish only its own verity. It would afford no presumption of the arrival and departure of the vessel; for it would be quite consistent with the fact, that the vessel had never arrived at the port. Indeed, the presumption from such non-deposit would be, that the vessel had never arrived at the port; for the law will not presume a violation of his duty by the master. It must be established by competent proofs.

Now, I do not well see, upon any established principles of evidence, how the certificate of the consul of the fact of the arrival or of the departure of the vessel was admissible as proof of the fact. It is not proof under oath. It is not authorized by any statute. It is not made any part of his official duty to keep a memorandum or record of such facts. They are not facts peculiarly or officially within his knowledge. They are susceptible of perfect proof from a great variety of other sources. It does not appear to me, that it is a case, which, upon principles of public policy, or otherwise, calls upon the

court to relax the rules of evidence, which are the great security of the rights and interests of all persons. In the case of Dunbar v. Harvie (2 Bligh R. 351), the House of Lords held a certificate of an officer of excise, as to matters within the scope of his official knowledge and duty, not admissible evidence. And I do not find, that upon that occasion, any authorities were adduced, having the slightest tendency to shake the rule as to the non-admissibility of the certificates of public officers generally. My judgment is, that the decision of the district judge was, upon general principles, correct; and that the judgment ought to be affirmed.

It is unnecessary to decide the other point raised in the case; and that is, whether the certificate, if otherwise admissible, is not incompetent evidence, because it is the certificate of the plaintiff on the record. The argument is, that though he is a plaintiff upon the record, he has no interest, as he sues under (361) the authority of a statute for the sole benefit of the United States, and he is not liable for costs. As to the non-liability for costs, I am not aware, that that point has ever been directly decided. The plaintiff here sues in his own proper name and person, and not merely by his official name, as the postmaster general does, under the act of 1810, ch. 54, s. 29, or the act of 1825, ch. 275, s. 31. And there may be a distinction in the cases. Suppose a bond given to a person "for the use of the United States," and the obligee sues, is he of course to be exempted from the payment of costs? That has never yet, to my knowledge, been decided; and I give no opinion upon it. But the more enlarged question is, whether a party plaintiff of record, although he has no interest in the suit, can be admitted as a competent witness. I am aware, that my late brother, Mr. Justice Washington, in Willing v. Consequa (1 Peters Cir. Rep. 307), held that he may. But I also know, that that decision has not been thought entirely satisfactory; because, it has been suggested, he is disabled by law, from the mere circumstance of his being a party, without any reference to his ultimate interest, as a party, to give testimony in his own cause. Upon this also I give no opinion.

There is another question arising out of the record, which has not been argued; but upon which, nevertheless, I wish to suggest my own doubt, and that is, whether an information by the district attorney will lie in this case. The result, to which I have come, renders it unnecessary to decide the point. But I ought not to disguise, that I think it difficult to maintain an information, upon the terms of the statute, or for the penal objects, which it is designed to enforce. I do not remember a single case, in which an information for a penalty

has been maintained, except where the suit has been brought in the name of the government itself.

Judgment affirmed.

LEWIS v. JEWHURST, (1866, Great Britain)
15 L. T. 275.
Cockburn, Court of Queen's Bench.

COCKBURN. (Extract) The consul's certificate, obtained in the absence of the seaman was not conclusive evidence of the fact of desertion.

LILIAN M. VIGUS, THE, (1879, U. S.—Great Britain)
10 Ben. 385; Fed. Cases 8,346.
Choate, District Court.

[Libel for wages of men declared deserters—court takes jurisdiction in spite of British consuls protest.

By the English statute the desertion to relieve the master must be entered in a certain manner and the entry examined, declared to be regular, and signed by the consul. The court decided that the entry had not been properly made, although the consul had declared it so, and that the consul could only judge from the general appearance and in so far the act made his opinion conclusive, but that the manner in which the entry had been made, might be shown by evidence to be illegal.

In this case the 2d vice-consul heard the dispute between the crew and master and ordered the crew back to the ship to take up work.—ED.]

LILLA, THE, (1862, U. S.)
2 Sprague 177; Fed. Cases 8,348.
Sprague, District Court.

[Refers to case of the Anne indirectly.—ED.]

LOBRASCIANO'S ESTATE, IN RE, (1902, U. S.—Italy)
77 N. Y. Supp. 1040; 38 Misc. 415.
Silkman, Surrogate's Court, New York.

(1041) In the matter of the estate of Gaetano Lobrasciano. Application for decree turning over the proceeds of the estate to the consul general of Italy. Decree rendered.

D. Humphreys, for consul general of Italy.

Burton C. Meighan, for Union Sav. Bank of Westchester.

SILKMAN, S. The consul general of Italy applies to this for a decree, under section 2709 of the code, directing the U Savings Bank of Westchester to turn over to him, for the purpc administration and payment of debts, and export of the surplus t next of kin, who are subjects of the kingdom of Italy, certain m in the possession of said bank belonging to the decedent, an It subject who died in this county intestate. No answer is filed, an facts are admitted. The application would be granted upon th thority of *In re* Fattosini, decided by this court (33 Misc. Re 67 N. Y. Supp. 1119) without comment, were it not for the de of Surrogate Thomas *in re* Logiorato, 34 Misc. Rep. 31, 69 Supp. 507, in which he questions the correctness of the decision c court in the former case. The great respect in which the opini the learned surrogate of New York county are held compel court to review the question as to the authority of the consul g of Italy, under treaty provisions and under the law of nations, to this application.

It was held by this court, in the Fattosini case, that the co and commercial treaties between the United States and the kir of Italy, by virtue of the "Most Favored Nation" clause of the mercial treaty of 1871, embraced the privileges granted by the article of the treaty between the United States and the Argentir public, and gave the consul general of Italy the paramount ri take possession of and administer the estates of Italian subjects intestate within his consular jurisdiction.

Article nine of the treaty with the Argentine Republic is i language:

"If any citizen of the two contracting parties shall die, without will o ment, in any of the territories of the other, the consul general or consul nation to which the deceased belonged, or the representatives of such general or consul in his absence, shall have the right to intervene in the sion, administration, and judicial liquidation of the estate of the deceas formably with the laws of the country, for the benefit of the creditors ar heirs." 10 Stat. 1009.

Surrogate Thomas says in respect of this provision:

"It will be observed that the right assured to the consul general i tervene,' and this intervention is to be 'conformably with the laws of th try.' To intervene is 'to come between' (Webst. Dict.), and the right t vene in a judicial proceeding is a right to be heard with others who ma demands or defenses. It is not a right to take possession of the entire of a fund which is the subject of the proceeding. A right to interver formably with the laws' of the state of New York is something different right to set aside the laws of the state, and take from a person who, by the

is the officer intrusted with the administration (1042) of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets."

In considering the conclusions of the learned surrogate, we must determine whether the interpretation given by him to the word "intervene" is not too restricted. He gives to it only that meaning which it has under the state law relating to state practice, to come in and be heard, or, more correcly, to come between and be heard. He does not give to it its full meaning in its ordinary sense. To intervene is to come between; "and to be heard" is added to the definition only by local legal signification and usage. It is true that, in the interpretation of treaties, the same general rules are adopted which apply to the construction of statutes, contracts, and written instruments generally, in order to effect the purpose and intention of the makers. Wilson v. Wall, 6 Wall. 83, 18 L. Ed. 727; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425. Nevertheless, there is this difference: That the language of treaties in most instances, as it comes for interpretation or construction, is but a translation from a foreign tongue, and there would be great danger of violating the spirit of such an instrument were we to bear too heavily upon the local technical definition and use of a word. See U. S. v. Percheman, 7 Pet. 51, 8 L. Ed. 604. When a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont, 3 Pet. 242, 7 L. Ed. 666; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628. Treaties may be construed on the principle of instruments in *pari materia*. Shanks v. Dupont, 3 Pet. 255, 7 L. Ed. 666. And it would seem a proper application of this principle to look into the legislation of the high contracting parties upon the subject, as well as to look to what view the executive branches of the government have taken, for, if they have already interpreted, courts will not set up to the contrary. Foster v. Neilson, 2 Pet. 253, 7 L. Ed. 415.

That treaties should be interpreted, in case of doubt, according to the tendency of international law, commends itself as a reasonable legal proposition.

Therefore, looking at the laws of the governments parties to the treaty, not because they control in respect to the matter before us, but as a guide only to the spirit and meaning of the treaty under consideration, we find the following provision in the United States revised statutes (section 1709):

"Sec. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the

United States, other than seamen belonging to any vessel, who shall die withi their consulate, leaving there no legal representatives, partner in trade, trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of t United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he die and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of t estate as shall be of a perishable nature, and such further part, if any, (1043) shall be necessary for the payment of his debts, and, at the expiration of one ye from his decease, the residue.

"Fifth. To transmit the balance of the estate to the treasury of the Unit States, to be holden in trust for the legal claimant; except that if at any ti before such transmission the legal representative of the deceased shall appear a demand his effects in their hands they shall deliver them up, being paid their fe and shall cease their proceedings."

And in the laws of the kingdom of Italy relating to the functio and attributes of consuls, this provision:

"Art. 25. In the event of the death of an Italian, the consuls can exec all and any kind of deeds of protection, release, or administration in the terests of the deceased or his estate."

In Wheat. Int. Law, p. 175, the principle is laid down:

"The consuls have authority and power to administer on the estates of t fellow-subjects deceased within their territorial consulate."

In the matter of Parsons, deceased, Secretary of State Marcy, 1855, writing officially to Mr. Aspinwall, consul general at Lond says:

"The consuls of the United States are authorized and requested to act administrators on the estates of all citizens of the United States dying in tate in foreign countries, and leaving no legal representative or partner in tr Indeed, this is one of the most sacred and responsible trusts imposed by t office, and in this respect they directly represent their government in protec the rights and interests of the representatives of deceased citizens. The co of the United States, therefore, was the only person who could legally touch property left by the deceased, Parsons: it was his duty to deposit the proc thereof in the treasury of the United States, there to await the decision of proper authorities as to its final disposition." Whart. Law Dig. 782.

In the matter of Chadwick, deceased, arising in 1875, Mr. C walader, acting secretary of state, representing his government, wri

"In the case of American citizens dying abroad, it is made by law duty of the United States consul within whose jurisdiction such death occu take charge of the effects of the deceased, cause an inventory of such effects t taken, and dispose of any that may be deemed perishable by sale at public auc and the proceeds of which, together with all other property and moneys of

deceased, he is to hold subject to the demand of the legal representatives of the deceased. In case such representatives do not appear and demand the estate within a year, the consul is required to transmit the effects to the treasury department, there to await final distribution to the parties entitled to receive them."

And again the same distinguished lawyer, writing officially, says:

"When a citizen of the United States, not a seaman, dies abroad without leaving a will, it is made the duty of a consul to take charge of any property he may leave in the consular district, and, after paying the debts of the deceased contracted there, to send the proceeds of the property at the expiration of a year to the treasury of the United States, there to be held in trust for the legal representative. In case, however, a legal representative shall appear and demand the effects, the consul is required to deliver the property to him, after deducting the lawful fees. The statute on this subject may be found in section 1709 of the revised statutes of the United States."

(1044) Cushing, attorney general in 1856, held that consuls under the United States law, in the absence of treaty authority, could not intervene as of right in the administration of a decedent's estate except by way of surveillance. 8 Op. Atty. Gen. 98; Whart. Law Dig. 784, 785.

Attorney General Black in 1859 held that the United States was not bound by treaty with Peru to pay a consul of that country, the value of property, belonging to a deceased Peruvian, which the consul was entitled to administer, but which had been unjustly detained and administered by a local public administrator, and that the remedy of the consul was in the courts. 9 Op. Atty. Gen. 383.

While United States statutes are to be considered in arriving at the spirit and intention of a treaty, I apprehend that state statutes are not so entitled. State legislatures are only remotely connected with the treaty-making power, and their right to negotiate treaties is expressly prohibited by the federal constitution.

"All treaties made, or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const. art. 6, § 3.

This plain language compels the elimination of all consideration of state laws while in the business of construing a treaty. State law must yield, and adjust itself to the spirit and intent of a treaty. Ware v. Hylon, 3 Dall. 199, 1 L. Ed. 568; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; *In re* Parrott (C. C.) 1 Fed. 481. Federal laws and treaties must be read together, and reconciled if possible. Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; Taylor v. Morton, 2 Curt. 454-457, Fed. Cas. No. 13,799; Ropes v. Clinch,

8 Blatchf. 309, Fed. Cas. No. 12,041. It in no sense follo
treaties and state statutes are to be reconciled. If that were a
ed, there might have to be as many reconcilements as there ar
in the Union. I find no federal authority wherein the possibili
the exercise of privileges of prerogatives under a treaty migh
fere with the provisions of state statutes or practice has been e
cussed. And other than the Louisiana case cited by Surrogate
as, and another Louisiana case to which I shall later refer, I
state authorities. On the contrary, I find that the United Sta
compelled to pay the loss awarded by international arbitrator
the surrogate of New York county, in violation of the trea
Peru, failed to award administration to the Peruvian consul, b
it instead to the public administrator. *In re* Vergil, 4 Moo
Arb. 390. The Peruvian treaty provided:

"That in the absence of the legal heirs or representatives, the co
vice-consuls of either party shall be ex officio the executors or admi
of the citizens of their nation who may die within their consular juris
10 Stat. 945, art. 39.

I quote from the unanimous decision of the four arbitrato

"In the month of May, 1857, the Peruvian citizen Jean del Carme
returning from New York to the Pacific, died on board the steame
(1045) City. The agents of the company to which that steamer belong
his personal effects in the hands of the 'public administrator of the city
York.' The minister of Peru in the United States, in July of the s
represented to the secretary of state that the Peruvian consul in the
had made proper representations to entitle him to the charge of the
under existing treaty stipulations, but that, failing to secure the right
guaranteed to him, it was necessary to interpose diplomatic offices. The
of state immediately instructed the law officer of the government of t
States in the city of New York 'to take such steps as would secure c
with the provisions of the treaty.' The conflicting claims of the public
trator and of the consul of Peru appear to have been heard before
gate's court of New York, at different times, up to the 2d of Decem
after which no record is found of further judicial investigation, althou
tinued to be the subject of diplomatic correspondence up to Decem
When the attention of the secretary of state (Mr. Cass) was first
this case, no objection was presented to the views expressed by Mr. Ow
erence to the Peruvian consul's right to take possession of Vergil's
under the treaty of 26th July, 1851; so far from it, it will have been
that prompt measures were taken to secure the observance of the stipu
the thirty-ninth article of that treaty. When it had become evident
proceedings were unsuccessful, the question was referred to the atto
eral of the United States 'for his opinion as to the requisite measures
sued, in order to give effect to the stipulations of the treaty.' That
clared that the detaining of the goods of the deceased from the Peruvian
unlawful, and a wrong which may justly be complained of. He thou

ever, that the Peruvian consul and minister were in fault in endeavoring to obtain 'redress where there is no authority to furnish it,' and he added that the judicial authorities would have given them this justice 'for the asking.' Dismissing any further question upon the principles involved in this claim, in regard to where there is no disagreement among the commissioners, it remains only to arrive at a just measure of the value of Vergil's effects as they were delivered to the public administrator, and claimed by the consul of Peru."

While the forms of expression in the numerous treaties of the United States widely differ, nevertheless governments in their negotiations acted according to well-defined principles, and had in view specific objects, and, although the language varies in the different treaties, the privileges and prerogatives given and obtained in respect to the same subject are in furtherance of the same common principle and object. So, where provisions are found in one treaty of doubtful import, we are entitled to look to the provisions of treaties with other nations, on the same subject, which are free from doubt, or which, having been construed, will aid us in determining the true spirit and meaning of that which is in doubt. It is true that in Aspinwall v. Queen's Proctor, 2 Curt. Ecc. 241, decided in 1839, the English prerogative court held contrary to the view of international law for which I contend. This case was decided at a period when that clause of the treaty between England and Spain which gave to their respective consuls the right to administer upon the estates of their country's subjects was being freely violated by both parties. It was also before the policy of the nations in respect to the authority of consuls had taken form so as to become a necessary part of the reciprocal relations between nations, and parliament had not by act at this time adopted a policy, as had the United States. The position taken by the English judge was in direct conflict with the opinion of Secretary (1046) Marcy above referred to, and I believe in conflict with the present interpretation of international law by all continental Europe. In this country I find but one published authority, other than that of Surrogate Thomas, agreeing with the English view, and that is the case of Lanfear v. Ritchie, 9 La. Ann. 96, in which case the court, in an opinion of but a few lines, asserts the sovereignty of the state, and denies the right of federal authorities to interfere in probate matters. This case as an authority suffered severely in the early sixties, and it seems now of more than doubtful authority, since the decision of the supreme court of Louisiana in Succession of Rabasse, 47 La. Ann. 1454, 17 South. 867, 49 Am. St. Rep. 433, decided in June, 1895, reversing the civil district court (the court of probate), and holding that the provisions of the treaty with Belgium, the stipulations of which were applicable to France, giving the consul the right to appear

personally, or by delegate, in all proceedings, in behalf of ab minor heirs, repealed the authority given by law to the probate to appoint counsel or guardian *ad litem* to absent heirs. In th there was a will and an executor, and the right to administer d arise. Judge Ellis of the civil district court, whose decision v versed, took much the same view as is taken by the surrogate Logiorato case upon the subject of state authority. He said re to the treaty provision:

"I do not understand that its object or its effect was or is to stril the authority or jurisdiction of the local probate tribunal, and to su therefor, in the contingency named, the power and authority of a residen to be by him exercised personally, or by a selected delegate. In this su during the progress of its settlement, should the consul of France or his find it necessary to appear in behalf of absent or minor heirs domiciled in the treaty stipulation, which confers judicial standing *quoad hoc* on th or his delegate, would be respected within the limits of the contingencie in said treaty; but, as a probate judge holding my authority from a s state of the union, I do not recognize the right or power of the consul, take charge of the administration personally, or by delegate, nor his righ dicate what member of the bar I shall appoint to represent the absent heir deceased. The property of the succession is all here; the deceased lived s domiciled here. There may be domestic creditors, or domestic heirs legs stituted. Our state laws provide fully for the protection of the interests resident parties, and the succession is in the hands of a native testamen ecutor. I hardly deem it worth while to refer to the constitutional righ government of the United States to regulate probate matters, or the settle successions in the several states of the Union. There can be, under our sy federal government, no such things as federal probate jurisdiction within the states, i. e., outside of the District of Columbia and the several ter The probate jurisdiction was not conferred by the people, in their cons upon the general government, and ergo it was reserved by the states people thereof respectively. It would not be in the power of the general ment to withdraw this authority from the states, or any of them, by mea treaty with a foreign government, and therefore to construe the 15th a said treaty (16 Stat. 763) as is here contended by the representative consul of France would be to announce its indirect nullity because notativ federal constitution. I do not so construe it; it is a useful and benefi vision, and will be respected in its letter and spirit whenever the occasio to which it has application. I do not assume, nor can I, that it has ever intention (1047) of the high contracting powers to said treaty that the co either should have any other powers *quoad* the matters referred to in sai 15 than those of full capacity to appear, and obtain from the local probat the necessary processes for the provisional care, protection, and preserv the minor heirs, or property of their countrymen dying abroad under th tions stated in said article."

The supreme court of Louisiana in reversing the civil court say:

'If the treaty is susceptible of the construction of the appellant, th

will be to avoid the appointment of an attorney for the absent heirs, and require the recognition of the appellant as the delegate of the French consul. In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present and represented. * * * It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the right of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, state and federal. * * * The treaty discloses no purpose to require our courts to appoint, as the attorney for absent heirs, the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court as representing the absent heirs, and precluding the appointment of any attorney to represent them."

Having discussed the principles of the interpretation and construction of treaties at some length, let us look at the particular language before us. Consuls are given the right to intervene "in the possession." We must give this form of expression some weight and some effect. It would seem that the only intelligent construction would be that the consul had the right to come between the property and the possession by some one else than himself, with the result that possession must necessarily be landed in him. To intervene in the administration is secondary; he first comes into possession, and then he comes between the administration and the person who might have a right thereto under state law. This is giving to the word "intervene" its ordinary definition, and avoiding its local legal significance. Endeavoring to ascertain the spirit and intention of the language "to intervene in the possession, administration and judicial liquidation of the estate of the deceased," we must have regard for the entire context, and we may not select a single word for definition. It must not be viewed, as would a New York statute, from our own local standpoint. It must be borne in mind that there can be but one correct construction of a contract; therefore, as we construe, so must the authorities of Italy; consequently, we must view it from the Italian, as well as our own, standpoint, and from both see what was intended to be accomplished by the use of the words quoted. This can be done in no better way than by studying the policy of Italian law on the subject, and at the same time realizing that the estates of foreign subjects are to be distributed according to the law of their own country, (1048) and not ours, and in such distribution the consul is more competent to execute the laws of his country, of which he must be presumed to have particular knowledge, while our courts, on the contrary,

are not presumed to be learned in foreign laws, and cannot tak
dicial notice of them. If the words, "conformably with the law
the country for the benefit of the creditors and legal heirs," rela
rights, and not to procedure, then the estate of a foreign subject w
have to be distributed in accordance with our state statutes of distr
tion. This certainly could not have been the intention of the cont
ing powers. They could not have intended to take from their
subjects the rights which they would have enjoyed had their inte
died at home, and to permit them to share according to a for
statute of distribution. The right that is given by the treaty is
possession and paramount right of administration, and this is
limited by the words "conformably with the laws of the country
the benefit of the creditors and legal heirs." These latter words
vide merely for the procedure. The consul, having been given
right of possession, is then required to administer the estate in
formity with the local laws in reference to such matters. This i
pretation gives full protection to the domestic creditors, and th
all that the policy of the state law demands. The desire of state co
is to protect resident creditors, and after that is done they hav
further concern except to deliver the property into the hands of
officers of the state to which it properly belongs. There is no p
ciple known to American law requiring our courts to protect for
subjects against the claims of duly accredited representatives of t
own government.

I am satisfied that, both under a fair interpretation of the tr
provisions as well as under the general law of nations as recogn
by the United States, the Italian consul is entitled to the possess
for the purposes of administration, of the property of all Italian
jects dying intestate within his consular jurisdiction. Decreed acc
ingly.

LOGIORATO'S ESTATE, IN RE, (1901, U. S.—Italy)
69 N. Y. Supp. 507; 34 Misc. 31.
Thomas, Surrogate's Court, New York.

(506) Application by the consul general of Italy for letters of
ministration on the estate of Giuseppe Logiorato, sometimes known
Joseph Gerrodo, deceased. Letters granted. Italy Consular Tr
1878, art. 17, declares that consular officers of such country shall en
all the rights, prerogatives, and privileges granted to those of the s
grade of the most favored nations.

D. Humphreys, for petitioner.

THOMAS, S. The decedent was at the time of his death a r

dent of this country. He died intestate, and left assets in this country in a small amount. He was a citizen and subject of the kingdom of Italy, and all of his next of kin are residents of Italy. He left no next of kin residing in the state of New York, and it is alleged in the petition that there are no creditors. The petitioner is the consul general of the kingdom of Italy. The public administrator, though duly cited, makes default. The petitioner asserts a right to administration without giving any security, and in preference to the public administrator, and bases his claim on the facts as to treaty provisions in the treaties between the United States and Italy, recited in the opinion of the learned surrogate of Westchester county in the recent case of *In re* Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119, and on the rule asserted in that decision. The application will be granted on the ground that no relative, or guardian of a minor relative, and no creditor or public administrator, will consent to become administrator, and the petitioner is a legally competent person to act as such (Code Civ. Proc. § 2660); but I am unwilling to base my conclusion on the reasoning of the case cited or to adopt it as a precedent. I agree that a solemn treaty of the United States with Italy is of binding force, and that it must control all courts, even to the extent of ousting them of jurisdiction or of changing the rules of their procedure, but in order to accomplish this result their meaning and purpose must be clear and explicit. Conceding that, under the "most favored nation" clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls general, the stipulation contained in the treaty of July 27, 1853 (10 Stat. 1009), with the Argentine republic, becomes a part of the treaty with Italy, I do not find (509) in that stipulation any justification for the conclusion sought. It is in the following words:

"Art. 9. If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

It will be observed that the right assured to the consul general is to "intervene," and that this intervention is to be "conformably with the laws of the country." To intervene is to "come between" (Webst. Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a

fund which is the subject of the proceeding. A right to in "conformably with the laws" of the state of New York is son different from a right to set aside the laws of the state, an from a person who, by those laws, is the officer intrusted with ministration of estates of persons domiciled here, and wh no next of kin within the jurisdiction, the right and duty of istering their assets. And, when the laws of the state require ministrator to give a bond to be measured by the value of nothing in the treaty provision grants to the consul an immunit this requirement to be obtained merely by asserting, in substan he has no knowledge of the existence of any debts. The emine writers cited in the opinion of the learned surrogate do not in that the courts of civilized states, acting under general laws for the protection of foreigners equally with their own citizen grant administration, contrary to the terms of those laws, to c under any circumstances whatever. Thus, in Wools. Int. Law, the learned writer, in enumerating the duties of consuls, inclu power "of administering on the personal property left within consular districts by deceased persons, when no legal repr tive is at hand, and when law or treaty permits, and thus of senting them, it may be, before the courts of the district." C may accept administration, but no right to override local law gested. See, also, Wheat. Int. Law (3d Ed.) 167, 168. A s question was passed upon by the supreme court of Louisiana in in Succession of Thompson, 9 La. Ann. 96. In that case admi tion was granted to the official curator, under the laws of Lou of a decedent domiciled in the state, and leaving property with jurisdiction of the court. The petitioner was the vice consul kingdom of Sweden and Norway, who represented that the de was a Swede by birth, and at the time of his death was a subj the king of Sweden. On this ground he claimed the right, capacity of consul, to take the succession out of the hands of t fendant, who was the duly-appointed administrator. This rig alleged, he was entitled to exercise under the laws of nations, th of the United States, (510) and by virtue of treaties entered in tween the United States and the kingdoms of Sweden and No The court said:

"The right claimed is incompatible with the sovereignty of the state, jurisdiction extends over the property of foreigners as well as citizens within its limits. The disposition of the estates of foreigners has been the subject of special legislation, and no treaty or law of the United exists which, as the paramount law, confers any such right as is claimed

petitioner, nor are we aware of any principle of the law of nations which would entitle the petitioner to call in question the authority of our laws on that subject."

In Aspinwall v. Queen's Proctor, 2 Curt. 241, 244, an application was made in the English prerogative court of Canterbury by the American consul to take administration of the goods of an American subject domiciled in America, who died in *itinere,* leaving personal property in the jurisdiction of the court. The application was denied in the opinion of Sir Herbert Jenner on what appeared to me to be satisfactory grounds. Among other things, he stated that the crown was the party to see that the property of any person dying within its dominions gets into proper hands. My conclusion, therefore, is that the petitioner may have letters on giving the usual security, but that this is done pursuant to our local law, and because the public administrator has refused to act.

Letters granted.

LONDON PACKET, THE, (1815, U. S.)
1 Mas. 14; Fed. Cases 8,474.
Story, Circuit Court.

(Extract) There had been a claim. A consul was authorized to claim in behalf of subjects of his country. It was admitted in other countries, and he should be sorry, if a different rule were to prevail here.

LONG v. POWELL, et al., (1904, U. S.)
120 Ga. 621; 48 S. E. 185.
Fish, Supreme Court of Georgia.

"(Syllabus) A consul of the United States is authorized to take at his consulate an acknowledgment of a deed to realty situated in this state, and his certificate, under official seal, is evidence of such acknowledgment.

LORING v. THORNDIKE, (1862, U. S.—Germany)
5 Allen 257.
Merrick, Supreme Judicial Court of Massachusetts.

(263) (Extract) In reference to this question, it appears from the uncontested (264) evidence in the case that on the 4th of August 1851 Mr. Thorndike, who was a citizen of Massachusetts, and Katharina Bayerl of Mayence, in the grand duchy of Hesse-Darmstadt, were temporarily residing at the free city of Frankford, neither of them then having or ever having had any domicile there, and were

desirous of being lawfully married; that, being foreigners and
acquainted with the local law, they applied for information "to ma
trates, counsel and other persons skilful in the law," and were advi
that "the proper mode of entering into the marriage relation was
solemnization of it before the consul of the United States at Frankf
on the Main;" that Mr. Schwendler, the consul, gave them the sa
advice; that they thereupon appeared before him for the purpose
being married, and there signed their marriage agreement, wh
was attested in the presence of two subscribing witnesses, and
then duly entered in the consular register; and duplicate copies o
were delivered at their request to each of the parties.* The con
then declared that their marriage was legal and valid. And in ad
tion to this he informed them that he had married many Ameri
gentlemen to American or German ladies; and that these marria
solemnized and registered by the consul, as was (265) done in
case, had always been regarded by the Frankfort and German auth
ities as valid. In the full belief that they were thus lawfully m
ried, they thenceforward lived together as husband and wife, dur
the life of Mr. Thorndike.

Here then there was in fact a contract of marriage between
parties, and a celebration of their nuptials by the observation o
form and ceremony which they were advised and believed made th
marriage binding, obligatory and complete. But its validity is now
nied, upon the ground that the civil validity of a marriage contract
entered into or celebrated at the free city of Frankfort, depends whc
upon the civil act upon that subject there enacted. And these part

*The following is a copy of this agreement: "We, the undersigned, And
Thorndike, of the city of Boston, county of Suffolk, and state of Massachus
aged sixty years, and Katharina Bayerl, of the city of Mayence, in the gr
duchy of Hesse, aged twenty-six years, do hereby declare, that we have truly
solemnly promised to marry each other, and that we now both wish to enter
the state of marriage; and that we desire, in conformity with the laws of
United States of America, that the civil act of our union in marriage may
executed in the usual form before Ernest Schwendler, Esq., the duly appoi
consul of the United States of America for this free city. We therefore con
by these presents our mutual consent to the desired conjugal union, and do
cerely and solemnly promise scrupuously to fulfil the duties of husband and w
by virtue of our respective seals and signatures.

"Frankfort on the Main, Aug. 4, 185

(Seal) Andrew Thorndike.
(Seal) Katharina Bayerl."

"Sealed and signed in presence of
G. Lindheimer,
E. Eckhardt,
As witness."

not having conformed to the provisions and requirements of that act, it is contended that they were never lawfully married.

The difficulty in determining this question arises from the conflict of evidence in relation to the question, what was the local law of the place where they were married? We have a copy of the civil act of the free city of Frankfort annexed to the depositions of the witnesses who have been examined upon the subject, all of whom are counsellors at law and residents of that city. Dr. Von Guaita and Dr. Hoffman, witnesses on one side, testify that the civil act, which contains the provisions of law with regard to the form in which a marriage is to be entered into there, applies as well to foreigners as to citizens of Frankfort; and that as the civil validity of a marriage depends solely on the execution of that act or the due observance of its provisions, the ceremony and proceedings which took place before the American consul, as before stated, did not constitute a valid marriage. But on the contrary Dr. Braunfels and Dr. Voigt testify with equal confidence that the civil act of Frankfort is inapplicable to foreigners; that marriages between such persons which are entered into at that place according to the prescriptions of the common law are valid and obligatory; and that, under the circumstances before stated, the marriage between Mr. Thorndike and Katharina Bayerl, which took place in the presence and with the sanction of the consul of the United States, was legal and valid.

(266) In this positive and irreconcilable conflict of testimony, we are under the necessity of considering the reasons assigned by the witnesses for the opinions they express, and of comparing their opinions with the language and terms in which the civil act is expressed.

It is noticeable, in the first place, that Drs. Von Guaita and Hoffman deduce their conclusions entirely from the particular provision in the statute of Frankfort, denominated the civil act, which, after prescribing the course of proceedings to be had to constitute a marriage there, declares that the validity of the marriage shall depend upon the execution of that act. But they fail to point out or indicate any part of that act which, either in direct terms or by necessary or reasonable implication, makes it applicable to foreigners temporarily resident there, who seek to contract a marriage and to be lawfully married at Frankfort; nor do they refer to any judicial interpretation of its provisions to that effect, or to any legal authority in support of their opinion. But Drs. Braunfels and Voigt testify that they have known many cases, to some of which they particularly refer, in which it has been determined by German tribunals that the said civil act does not apply to or embrace the cases of foreigners entering into that relation in that city. And that this is a reasonable and proper con-

clusion would seem fairly, perhaps it might be said necessarily, to
sult from several provisions of that act. It is upon this question ve
significant that the civil act makes very precise and exact provisic
as to the manner in which citizens of Frankfort may conclude a va
marriage abroad, while it does not in any word or phrase allude
the way or manner in which foreigners may conclude a lawful m
riage there. But a more important and what perhaps ought to be
garded as a decisive consideration, results from the provisions concer
ing the publication of banns. These are most expressly required
be published in each of the places where the parties proposing and
tending to be married are respectively domiciliated; in the city in o
in the rural districts in another prescribed form and manner. A
this prior publication of banns is made one of the prerequisites
sential to the validity (267) of the marriage. Such a provision,
would seem obvious, could not have been intended to have any ref
ence to foreigners who had not in some manner acquired a domic
there, because it ordains the observance of a regulation with whi
it would be impossible for such persons to comply, and to which
would therefore be absurd to require them to conform. This provisic
therefore, under an interpretation which appears to be just and r
sonable, has a very direct and strong tendency to show that the ci
act is only applicable to and obligatory upon citizens, and perso
who by choice, or long extended residence have obtained a domic
in the state where the law is enacted.

In support of this conclusion, and as tending also to prove t
validity of the marriage of Mr. Thorndike and Miss Bayerl, I
Braunfels testifies that the American consul "has always and at a
time been in the habit of solemnizing such marriages;" that he m
ried a great number of couples where each of the parties, or the h
band was a citizen of the United States; that this has been do
openly, with the full knowledge of the Frankfort authorities, w
have never in any manner objected or interfered to prevent it; and
adds: "I have known of some cases, (for instance, the case of M
Pfeil,) where Frankfort ladies, intending to marry American gent
men, have been released by the senate from their citizenship expres
'that they might enter into civil marriage before their consul.'
Certainly such a proceeding must be regarded as a very clear and a
thorative declaration that the provisions of the civil act of marria
are not applicable to or obligatory upon foreigners, and that a m
riage of such persons before the consul of their country, according
the prescription of the common law, would be recognized as legal a
valid at Frankfort. And this conclusion seems to be fully warrant
by the decisions in the cases referred to by the witnesses, in which t

marriage of foreigners by Protestant curates at Frankfort, without conforming to the requirements of the law of the 19th November 1850 —the civil act before referred to—has been acknowledged and upheld as valid by German judicial tribunals.

The testimony of Drs. Braunfels and Voigt, that the marriage (268) of Mr. Thorndike and Miss Bayerl by and before Mr. Schwendler, the consul of the United States, in the form and manner in which it was there contracted and entered into by the parties, is valid in Frankfort, as having been duly contracted according to the prescriptions of that portion of the common law which had not been there abrogated or repealed, is very strongly corroborated by the decisions to which they refer; and especially by the proceedings of the public authorities in releasing females from their citizenship in order that they might, and to enable them to, enter into a valid marriage there before the consul of the country of their intended husbands. And when it is considered that foreign consuls, and this consul in particular, did frequently and notoriously, for and in behalf of parties similarly situated, officially perform, and allow and permit to be performed in his presence, a form and ceremony with an intent and design thereby to marry the parties, and to make their marriage complete and legal; and that when Mr. Thorndike was carefully inquiring of proper and competent persons to obtain accurate information on the subject, he found it to be the concurrent opinion and advice of the consul, and of "magistrates, counsel and persons skilful in the law," that the proper mode and form of marriage by him as a foreigner was the solemnization of it before the consul of his country, and that such proceeding would make the marriage legal, we think that there is a clear preponderance of evidence that the statements of Drs. Braunfels and Voigt are to be relied upon, and consequently that the lawfulness and validity of the marriage of Mr. Thorndike and Miss Bayerl are satisfactorily proved and established. The circumstances which have been shown, and as to which there is no dispute and can be no doubt, concerning the cohabitation of these parties as husband and wife, their constant and mutual recognition of the subsistence of that relation, and their care and nurture of children as their common offspring, would be quite sufficient, under the provisions of our own statute, in the absence of evidence as to the particular form and manner in which it was contracted or solemnized, to prove a valid and legal marriage. Gen. Sts. c. 106, § 22. And it would certainly be unreasonable and unjust to (269) withhold from our own citizens married in foreign countries the benefit of the presumptions resulting from the provisions of our own statutes. But it is unnecessary to urge or to rely upon this consideration, since upon the whole evidence be-

fore us there appears to be a clear preponderance of proof tha and Mrs. Thorndike were lawfully married at Frankfort, and their marriage would, in view of the proceedings and ceremoni tending it, be there recognized as valid by the public authoritie judicial tribunals. This being so, their marriage is, upon the w tablished principles of the common and international law, to l garded and treated as valid and obligatory in the countries whe parties respectively had their domicile. Bishop on Mar. & Div.

LORWAY v. LOUSADA, (1866, U. S.)
Fed. Cases 8,517.
Lowell, District Court.

(Extract) But, after he has done an act professedly offi see no reason why an individual may not try the question here, w the act was within the scope of his authority.

[In this case the jury instructed by the court gave the pl damages against the consul for half the fees charged.

This decision is hard to defend and is in conflict with Such a system might make it impossible for a foreign consul lect fees and would vary the fees according to the jurisprude the country in which the consul was established.—ED.]

LUSCOM v. OSGOOD, (1844, U. S.)
1 Sprague 82; Fed. Cases 8,608; 5 Moore 145.
Sprague, District Court.

[It would be the duty of consul to return minor sailor to rents.—ED.]

LYNCH v. CROWDER, (1849, U. S.—Great Britain)
12 Law Rep. 355; Fed. Cases 8,637.
Betts, District Court.

[On protest of British consul refused to take jurisdiction an pelled master to pay summary costs.—ED.]

McCANDLESS v. YORKSHIRE, (1897, U. S.)
28 S. E. 663; 101 Ga. 180.
Cobb, Supreme Court of Georgia.

(664) 1. The deed which was filed and recorded for the of making the levy in this case began with the words, "State

York, County of New York," and recited that it was the deed of "the Yorkshire Guarantee and Securities Corporation, Limited, by its president (naming him) and directors (naming two persons of the state and county aforesaid)." It was signed by the president and directors, and attested as follows: "W. A. Angells, Cleveland, Roadhead, Department Accountant. Frank C. McGee, Consul of the U. S. of America at Huddersfield, Eng." There was no evidence as to where the deed was actually executed. From the caption and the recitals in the paper it must be presumed, in the absence of evidence showing the place of its actual execution, that the paper was signed and attested in the state and county of New York. Allgood v. State, 87 Ga. 668, 13 S. E. 569.

2. If the paper was actually signed in the state of New York, the question is raised: Was it so attested as to be admitted to record under the laws of the state? "To authorize the record of a deed to realty or personalty, when executed out of this state, the deed must be attested by, or acknowledged before, * * * a consul or vice-consul of the United States, the certificate of these officers under their seal being evidence of the fact." Civ. Code, § 3621. "Every secretary of legation and consular officer is authorized, whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his legation, consulate, or commercial agency, * * * to perform any notarial act which any notary public is required or authorized by law to do within the United States." Rev. St. U. S. (2d. Ed., 1878) § 1750. Construing the section of the civil code which authorizes a consul to attest a deed in connection with the section of the revised statutes which defines the powers of a consul, it is clear that it was not intended that a consul could act, in relation to the the matter of attesting deeds, at any other place than that at which the laws of the United States authorize him to perform such acts. Therefore, if a consul of the United States attest a deed at any other place than his consulate, such attestation would not be sufficient to authorize the record of the deed.

M'DONOUGH v. DANNERY, (1796, U. S.—France and Great Britain) 3 Dall. 188.
Supreme Court.

[Salvage and residue of British ship captured by French and abandoned. British and French consuls claim the residue—and each in turn appeals—supreme court finally decides in favor of French consul's claim.—ED.]

McKAY v. GARCIA, (1873, U. S.)
6 Ben. 556; Fed. Cases 8,844.
Blatchford, District Court.

Suit Against Consul.—Practice.—Arrest.—Applicability of the New York Pendency of Another Suit for the Same Cause of Action.

(556) BLATCHFORD, J. This is an action for a deb the act of February 28th, 1839 (5 U. S. Stat. at Large, 321), nection with the act of January 14th, 1841 (Id. 410), imprisc for debt is allowed, on process issuing out of a court of the States where, by the laws of the state, imprisonment for deb be allowed, the conditions and restrictions prescribed by the st ing applicable to the process issuing out of the court of the States. The act of 1839 provides that "the same proceedings s had" in the court of the United States "as are adopted in the of such state."

The 179th section of the code of procedure of New (557) Yc vides for the arrest and imprisonment of a defendant in an act money received in a fiduciary capacity. This is such an actio

This being an action at law, the practice in it must, un 5th section of the act of June 1st, 1872 (17 U. S. Stat. at 197), conform, as near as may be, to the practice now existi like cause in the courts of record of the state of New York.

The defendant having moved, on affidavits on his part, stantially vacate the order to hold to bail, the plaintiff has under the provisions of section 205 of the code of procedure York, to oppose such motion on new and futher affidavits and in addition to those on which the order to hold to bail was ma

The pendency of a former suit against the defendant in court for the same cause of action, is of no importance, for su court was and is without jurisdiction of the suit, as the de was and is a foreign consul. But if he were not, the w authority is that the fact of the pendency of such suit in t court would be of no effect on this suit (Loring v. Marsh, 2 311, 322).

The cause of action here is one which was assignable.

On all the affidavits and papers on both sides, I am of opin the order to hold to bail would have been properly grantabl first instance. If so, it must be upheld.

The motion to vacate the order to hold to bail and to d the defendant from bail to the marshal on his filing commor denied.

MADONNA D'IDRA, (1811, Great Britain—U. S.)
1 Dod. 41.
Sir William Scott, High Court of Admiralty.

(Extract) But the court is not left solely to its own conjectures, as to what may be the established usage with respect to the subsistance of the dismissal of mariners employed in the navigation of Greek vessels. It is sworn by a person, who states himself to have been for twenty years captain of an Ottoman vessel and at present the consul-general of the sublime porte resident in Great Britain, that * * *.

MAGEE, IN RE, (1885, Great Britain)
L. R. 15 Q. B. D. 332; 54 L. J., Q. B. 394.
Cave, Queen's Bench.

(Syllabus) When an affidavit or proof in bankruptcy is sworn abroad before a British consul, or vice-consul, a notarial certificate in verification of the signature and qualification of the consul, or vice-consul, is not required.

MAGEE v. THE MOSS, (1831, U. S.)
Gilp. 219; Fed. Cases 8,944.
Hopkinson, District Court.

(Extract) I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through influence he may have with our consuls or the officers in a foreign port.

MAHIN v. UNITED STATES, (1905, U. S.)
41 Ct. Cl. 1.
Booth, Court of Claims.

(Syllabus) A consular agent has no direct connection in the matter of accounting with the department of state. He is under the control and supervision of the consul, and to him only does he report.

MAHONEY v. UNITED STATES, (1869, U. S.—Algiers)
10 Wall. 62.
Field, Supreme Court.

[When Algiers came under the French control the salary of the American consul was abolished.—Ed.]

MALI v. KEEPER OF THE COMMON JAIL, See Wildenhus's case.

MANNHARDT v. SODERSTROM, (1806, U. S.)
1 Binn. 138.
Tilghman, Supreme Court of Pennsylvania.

(142) TILGHMAN, C. J. now delivered the opinion of the

This is an action on the case on a bill of exchange draw the defendant, who appeared and pleaded the general issue; a same time entering a protest against the court's jurisdiction, ve by his oath, in which he averred that at the time of issuing the in this clause he was, and still is consul general of his majest king of Sweden, in the United States of America. The defen counsel have now brought the point of jurisdiction before the by a motion to quash the writ; and it is confessed by the couns the plaintiff that the defendant's allegation, that he is consul g of the king of Sweden, is true.

Before I proceed to deliver the opinion of the court on the question, it will be necessary to take notice of one or two objecti the plaintiff's counsel which relate to other points.

They have placed some reliance on the circumstance of t fendant's having submitted to suits, judgments, and executio many instances; which they have proved by the records of this and the Common Pleas. In answer to this objection, it need o observed, that in those cases it did not appear on the record th defendant was a consul, and therefore the court could take no of it.

They have also urged that the defendant is too late in exc to the court's jurisdiction after pleading the general issue; and have been cited on this head from the English books of practic answer to this objection it is sufficient to say, that by the estab practice both in the courts of this state and of the United S the court will put a stop to the proceedings in any stage on its shown that they have no jurisdiction. In the cases of Duncan Maclure in this court, and of Snell v. Fausatt in the circuit co the United States before Judge Washington, a defect of juris appearing, in the opinion of the defendant's counsel, on the ev given on the trial of the general issue, the point of jurisdictio urged, and neither the counsel for the plaintiff, nor the court, su ed that there was any impropriety in going into the argument. previous points being disposed of, I will consider the merits of t fendant's motion, which will depend upon the constitution United States, and the "act to establish the (143) judicial cou the United States," passed 24th September, 1789, and commonly the judiciary act. By the 2d section of the 3d article of the co

tion, it is declared that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be party, to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects."

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction; in all the other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make."

It is now sixteen years since the courts of the United States have been organized , and during that time the construction of the article relating to the judicial power, has been frequently considered. Many principles have been established, by which we are bound. In conformity to those principles we are to understand, that by the expressions "the judicial power shall extend" to the cases enumerated in the section above mentioned, congress became invested with the right of assuming the exclusive jurisdiction for their courts; but in those of the said enumerated cases, where the state courts had jurisdiction prior to the adoption of the constitution, and where the acts of congress have not vested an exclusive jurisdiction in their own courts, the courts of the several states retain a concurrent jurisdiction. Thus in cases of "admiralty and maritime jurisdiction," the courts of the United States have always exercised an exclusive jurisdiction, and in disputes between "citizens of different states" they have exercised a jurisdiction concurrently with the state courts. And yet in both cases the judicial power of the courts of the United States is founded on the same expression in the constitution, that is to say, that the judicial power of the (144) United States shall extend etc. to those two cases among others that are enumerated in the same paragraph.

It being then established that congress had a right to assume an exclusive jurisdiction "in all cases affecting consuls," let us see what provision they have made upon that subject by their laws.

The 9th section of the judiciary act ascertains the jurisdiction of the district courts of the United States. (*a*)

In the first parts of this section, jurisdiction is given to the

(*a*) 1 U. S. Laws 53, 54.

district courts in various matters both of a criminal and a civil nat in some of which their jurisdiction is exclusive of the state cou and in others concurrent with them. Towards the latter part of section the district courts are vested with jurisdiction "exclusi of the courts of the several states, of all suits against consuls or consuls except for offences above the description aforesaid." word suits includes those both of a civil and criminal nature; and exception of "offenses above the description aforesaid" refers to a scription in the first part of this section, viz. offences where no o punishment than whipping not exceeding thirty stripes, a fine exceeding 100 dollars, or a term of imprisonment not exceeding months, is to be inflicted.

It is to be remarked that the jurisdiction of the district co in suits against consuls or vice consuls is exclusive of the state cou but not exclusive of the courts of the United States; because the ond section of the third article of the constitution had provided "in all cases affecting ambassadors, other public ministers, and suls, the supreme court shall have original jurisdiction." Acc ingly it is enacted by the thirteenth section of the judiciary act, the supreme court of the United States shall have "original but exclusive jurisdiction of all suits in which a consul or vice co shall be a party."

Then the ninth and thirteenth sections of the judiciary act consistent with each other and with the constitution; and in against consuls and vice consuls the jurisdiction of the state cour excluded. Nor are we to wonder at this provision. One conside object of our federal constitution was to vest in the United S the administration of those affairs (145) by which we are relate foreign nations. Consuls, although not entitled to the privileg ministers, often exercise very important functions; and it is rea able that in the constitution they are mentioned in conjunction "ambassadors and other public ministers;" and like them they e the important privilege of commencing suits in the supreme c of the United States. It was wise therefore to protect them suits in the state courts, although they are left at liberty to l action against other persons in those courts, if they find it conve and choose to do so.

Upon the whole the court are of opinion, that, it appearin the record that this suit is against the consul general of the kir Sweden, their jurisdiction is taken away by the ninth section o judiciary act, and consequently the proceedings against the defen must be quashed.

Proceedings quashed.

MARIE, THE, (1892, U. S.—Norway)
49 Fed. Rep. 286.
Deady, District Court.

[American who is a member of the crew of a Norwegian ship is subject to the jurisdiction of the Norwegian and Swedish consul in accordance with the 13th article of the treaty of July 4, 1827.—ED.]

MARINE WHARF v. PARSONS, (1897, U. S.)
26 S. E. 956.
Jones, Supreme Court of South Carolina.

Appeal from common pleas circuit court of Charleston county; W. C. Benet, judge.

Action by the Marine Wharf & Storage Company against Charles Parsons, Jr. There was a decree on demurrer sustained to the answer, and defendant appeals. Affirmed.

The decree of Mr. Justice Benet, and the grounds of appeal therefrom, are as follows:

"Although this cause was heard before me upon a demurrer to the answer during the April term of the court of common pleas for Charleston county, quite a number of records in several old cases were referred to in the complaint and answer and demurrer as if attached, and made a part thereof, and therefore the facts before the court were really quite voluminous. This feature of the case, which necessarily compels a somewhat long statement of facts, together with the number of legal questions raised and discussed under the demurrer, renders any other explanation of the length of this decree unnecessary, for the simple reason that no proper understanding, either of the facts or the law involved, would be practicable without quite a long reference to and discussion of the same.

"On July 17, 1895, the defendant made a bond and mortgage to the plaintiff for a portion of the purchase money of some property in Charleston, including lot 55, specially referred to hereafter. From the recitals in the bond it appears that the defendant had purchased and taken a deed of conveyance on that day from the plaintiff of the property, including lot 55, but had made some objection to the title in one particular, which objection was not admitted as being a valid one by the seller, the Marine Wharf and Storage Company. In order to complete the transaction, however, it was agreed that the conveyance should be made, and that the bond should be so conditioned as to protect the 'purchaser for a reasonable time, and in a reasonable way,

from damage on account of the alleged defect aforesaid.' The condition of the bond accordingly was that Parsons should pay the Marine Wharf $8,000, with interest, five years from date, 'or as soon before that time as the title to said lot 55 shall by a court of competent jurisdiction be held or made good so far as the alleged defect alone is concerned.' This defect, as appears from the pleadings, is that the proof of service upon certain minor defendants in a previous suit of Holmes against Zanoguera, in 1875, which formed one of the old links (957) in the chain of title, had been made by the affidavit of the party serving the minors, which affidavit was made before a consular agent of the United States, in the island of Majorca, kingdom of Spain, who signed and sealed the affidavit in his official capacity; the objection being that the affidavit was defective because not taken before a proper officer, qualified by the laws of South Carolina to take an affidavit. It will thus appear that the intention of the parties at the time of the execution of this bond, in 1895, was to allow an opportunity for a court of competent jurisdiction to declare the title to have been 'good' under the old proceedings, or else to make it good by new proceedings. This intention is clearly set out in the bond and in the complaint in this cause. The plaintiff, the Marine Wharf, immediately, during the month of July, 1895, filed a proceeding entitled ' Marine Wharf and Storage Company against Catalina Zanoguera et al.,' in the court of common pleas in Charleston county, in which it referred to the former suit of Holmes against Zanoguera, and the alleged irregularity in the proof of service, and asked that the court would hold and declare the old proceedings and proof of service to have been regular and valid, and no cloud on the title of this plaintiff, or else confirm them. To this suit were made parties defendant all of the heirs at law of Zanoguera, who had been defendants in the former proceeding of Holmes against Zanoguera, and the record shows that they were all duly and regularly served by publication and mailing of the summons and complaint. No demurrers or answers were filed or served. The suit came duly on to trial and judgment, and on September 7, 1895, the Hon. O. W. Buchanan, presiding judge, signed a decree in which he held that the former proceedings, including the proof of service in Holmes against Zanoguera, had been valid and binding; and he also further confirmed and ratified them, and vested and validated in the Marine Wharf and Storage Company the title to lot 55. From this decree no appeal was taken, and it therefore stands of force as a judgment of this court. All of this will be found upon reference to the proceedings. The Marine Wharf and Storage Company also spared no pains in its endeavor to satisfy Mr. Parsons, and also to notify the Zanoguera people of

the entire matter. Immediately, in July, 1895, it had prepared, under the seal and certificate of clerk of court, a copy of the original order for publication, and order for service, and original proof of service, in the old case of Holmes against Zanoguera. These were sent to Spain, and at the foot of these papers was obtained an affidavit from all of the heirs of Zanoguera (then in the Spanish island of Majorca) to the effect that all of the parties had been served in the former case, and that such service had been made as stated in the previous affidavit of Miguel Sbert, the party who served them in 1875. Miguel Sbert, it appeared from the allegations in the complaint, had died, and hence his affidavit could not be obtained; but the affidavit of the parties themselves was fortunately made before Ernesto Canut, the very same consular agent who had taken the original affidavit of Miguel Sbert in 1875. This affidavit of 1895 was filed *nunc pro tunc,* in the records of this court, in the old case of Holmes v. Zanoguera, and is also referred to in these present proceedings, and in the recent case of the Marine Wharf and Storage Company against Zanoguera and others, brought for the purpose of having the former proceedings declared valid and binding. Having done this, the plaintiff conceived that the title had been both 'held good' and 'made good' by a court of competent jurisdiction, and that the bond was due by its terms. It therefore filed its summons and complaint in the present cause, alleging these facts, and asked that it should have payment from Mr. Parsons of his obligation. To this complaint the defendant filed an answer, and the plaintiff demurred to the answer. The hearing came up on this demurrer.

"As already stated, in addition to the record in the present case, several other records were made parts of the pleadings and produced before the court; and, in order to emphasize the course of the proceedings, it is only proper to list these different papers which were so referred to and used in the argument, and which really are a part of the record in this case. They are as follows: (1)The present foreclosure suit of Marine Wharf and Storage Company against Charles Parsons, Jr. (2) The suit of Marine Wharf and Storage Company against Zanoguera et al., brought in 1895, in order to have the title held or made good. (3) The affidavit of 1895, admitting the fact of the service in 1875, which affidavit is filed with the old suit of 1875. (4) The original proceedings of 1875 brought by Holmes, administrator, against Zanoguera et al., for the purpose of settling the estate of Zanoguera. These latter proceedings will be more fully commented on in the discussion as to their validity. (5) Deed from Hunter, per Master Miles, to Marine Wharf and Storage Company, made in 1890. In connection with this, it may be well also to state

that the property which Parsons bought from the Marine Wharf co sisted of two lots, 55 and 56, concerning the latter of which (namel 56) there is no question. Lots 55 and 56 both had been bought l the Marine Wharf and Storage Company from the estate of Hunte under the deed from Miles, master, in 1890. Hunter had boug lot 56 from some third party, and had purchased lot 55 under t proceedings in the suit of Holmes, administrator, against Zanoguer in 1875. It is well to note that, at the time of the giving of t bond and mortgage, the sole objection which Mr. (958) Parsons urg against the title to lot 55 was the fact that although service had be made upon the Zanoguera minors in 1875, and a proof of such se vice had been filed in the form of an affidavit, this affidavit had be taken before a United States consular agent, and at that time, namel in 1875, a United States consular agent was not authorized in M jorca, Spain, to take an affidavit under the laws of the state of Sou Carolina. This was the only question raised at that time with r gard to the validity of the title, and on it the bond is conditione and it is all that could be or was discussed in this proceeding.

"So much, then, for the leading facts of the present case. It now proper to examine the facts in the record of the old suit of Holm v. Zanoguera, in 1875. At that time, one S. Zanoguera, then a re dent of Charleston, S. C., died, leaving a widow, Mrs. Catalina Zar guera, and certain infant children, namely, Catalina, Elvira, Mar Antonio, Madelina, Miguel, and Juanna Maria. Mr. F. P. Salas w appointed by the probate court of Charleston county general guar ian of the children, and Mr. George S. Holmes was made the admin trator of Sebastian Zanoguera's estate. This was done on the pe tion of the minors, and also of the widow. It became necessa to sell the property of the deceased, and the widow and the adm istrator and the guardian went into court, asking that the proper be sold, all the debts of the deceased paid, and the balance turn over to the widow and children. Inasmuch as the minors seemed, l fore the commencement of the suit, to have removed to the island Majorca, Spain, and to have resided outside of this state, it was nec sary to serve them by the service of the summons and complaint up the mother of the minors, and upon the general guardian, and up the minors themselves. All this was done, Mrs. Zanoguera admitt that she and the children had been served, and the general guardi also acknowledged these facts, and asked that a guardian *ad litem* appointed for the minors, to protect their interests. This was do and the court proceeded and settled up the estate for all the part in interest. The record shows this admission of service on the p of Mrs. Zanoguera, sworn to before a United States consular ag

at Palma, island of Majorca, and also the affidavit of the general guardian of the children, Mr. Salas, to the same effect. Under the order of court, a person named Miguel Sbert was directed to make the service of the summons and complaint upon the minors. Miguel Sbert did this, and he forthwith made an affidavit to that effect, on the 6th of October, 1875, before Ernesto Canut, who at that time was United States consular agent at Palma; and the latter certified to the same under his official hand and seal, Miguel Sbert signing the affidavit before him. The summons was also published in the newspaper, but it does not appear that the order directed deposit in the post office, or that such deposit was made. The cause went on to trial and decree, and the property, being sold, did not bring enough to pay even the mortgages on it, the mortgagees having been made parties to the suit.

"A complete summary of the pleadings in this old case is also of use, and will now be given: The defendants, in addition to the Zanoguera heirs, included H. M. Haig, a lien creditor, having a mortgage on the property in question, and also Ravenel, Holmes & Co. and Wm. A. Rook, made parties to represent general creditors. The complaint states that Zanoguera died intestate, February 18, 1875, leaving a wife and children, and that George S. Holmes had been appointed administrator of his estate , at the request of all parties in interest; that he owned, among other real estate, some water lots in Charleston, including lot 55 in a plat of the Laurens marshes (this lot 55 being the property under consideration in the present suit); that Zanoguera was largely indebted; that Haig had a mortgage on the real estate for $6,500, and that there were other debts amounting to about $25,000; that the real estate consisted, among other things, of a shipyard and machinery which was liable to deterioration, unless kept in good repair and in constant use, and that, Mrs. Zanoguera and all parties desired, as part owners in the property, to have Mr. Holmes, as agent and as administrator, look after the estate, and wind up the business; that the probate court had appointed Mr. F. P. Salas, the Spanish consul in Charleston, general guardian of all the children; that Ravenel, Holmes & Company and Rook were the largest simple contract creditors. The complaint then prays the temporary carrying on of the business, and a sale of the property as soon as possible. An order of publication was taken, and then the service was made in Majorca, and proved by the affidavit of Miguel Sbert; and, in addition to this, Mrs. Zanoguera made an affidavit and acknowledgment before the consular agent that the paper had been served on her children, the minors, and that it had also been served upon her after it had been served on them. After this, Mr. Salas, as the general

guardian of the children, under the laws of South Caro
came in, and under oath alleged to the court that the children
been legally served, and that it was necessary to have a guardia
litem appointed for them; and the court then and there, in resp
to these allegations of Mr. Salas, appointed him their guardian
litem. The mother of the infants filed her answer, admitting all
facts, and also gave Mr. W. P. Hall, a merchant of Charleston, pc
to act for her. All the other defendants admitted the complaint
cept the guardian *ad litem*, and he filed the usual answer submit
the rights of the infants to the court. The matter was referre
the master, and Haig proved his mortgage debt, and other claims
also proved to the amount of (959) over $9,000, making the total cl
proved something like $16,000. The decree was made, and the p
erty was sold, the proceeds not being enough to pay the mortgage
to Haig. One sixth of the unincumbered real estate was paid ove
Mr. Hall, as the attorney of Mrs. Zanoguera the widow, for her do
The decree of the court, which ordered the sale of the property,
ferred to all of the proceedings, took notice of all the facts,
ordered the sale. The sale was made as already stated, and the
ceeds went to the payment of the debts of the ancestor, Zanoguera
might be mentioned, also, that the general guardian of the infa
Mr. Salas, was served personally, and personally made, as alre
stated, under oath, his application to be appointed guardian *ad lit*
alleging that the infants had been legally served with the summ
and complaint. It should also be noted the record shows that M
(who it is alleged in the answer in the present case, subsequen
grew up, married, and died, leaving a husband and child, and c
cerning whose share alone the discussion really is made) was t
nine years old, so that, if she had lived, her age would be to-day ab
thirty years. The record in this old suit in 1875 speaks for its
and it shows a carefully conducted case, with all the parties app
ently before the court, including the minors, who were represen
by their general guardian, who was appointed guardian *ad litem;* th
mother also being before the court.

"These are the main features of the original suit, and all of th
matters happened nearly twenty-one years ago. Having thus fu
set out the facts of the case as the records disclose them, it will n
be practicable to deal with the legal positions.

"The answer sets out the sole alleged defect, namely, the pr
of service by Sbert before a consular agent in 1875, and practica
admits that the affidavit obtained on July 30, 1895, cured the sa
except as to Maria, Antonio, and Miguel, who did not sign it, a
Juanna, who, it is alleged, was under twenty-one when she attach

her signature. All question as to the other heirs, then, is at once eliminated. So far as Juanna is concerned, the mere fact that she was not of full age when she signed the affidavit, in July, 1895, would not seem to offer any difficulty, for several reasons: The records show she was then over twenty years old, and certainly her affidavit would estop her from ever afterwards disputing the truth of the facts sworn to therein. Besides this, she was subsequently bound by the decree of September 7, 1895, along with the others, as will be shown hereafter; for, it not being alleged in the answer that she was not of full age when this decree was taken, she is so presumed to have been. And, even, if she was a minor when the decree was taken, she was a party to the suit; and the decree against her, while possibly voidable as to her in a direct proceeding, is valid and binding as to third parties. She would be therefore barred and bound. 12 Am. & Eng. Enc. Law, p. 88; 1 Black, Judgm. § 193; 1 Freem. Judgm. § 151. As to the other three parties , it is also quite apparent that the new suit, in 1895, barred and bound their interests, if they were then of full age, and before the court. Of these three, Miguel and Antonio are easily next disposed of. Nothing at all is alleged of Miguel in the answer, and he being of full age, and duly made a party to the new proceeding, the decree of the court, in 1895, certainly was valid and binding as to him. On the death of Antonio, intestate, his interest descended to his mother and brothers and sisters, and all of them were before the court in 1895, and thus were barred and bound by the proceedings then taken. Maria alone is now left, and as to her the allegation of the answer is that at the time the proceeding to declare and confirm the title was brought, in 1895, she was dead, 'having died in April, 1890, leaving as her heirs, her husband and a child, now about six years old, and that these heirs were not parties to the said proceedings.' Thus, about Maria and her share only is there any question really raised in the answer, or worthy of being considered; and with reference to her, therefore, will the discussion now proceed. What is here said as to her, however, is sometimes also applicable to the other parties referred to in the answer, should any further discussion seem necessary as to them.

"The plaintiff, on argument, took several positions, which all then seemed, and still seem, sound. In the first place, I cannot bring myself to do otherwise than hold that the oath as to proof of service by Miguel Sbert before the United States consular agent, in 1875, was originally a valid affidavit. There is no direct case in point in South Carolina; but an examination of the statutes shuts me up to this conclusion, the alternative being a construction which would make the Code provision a nulity, and practically repeal it. Code, §

161 (act 1870; 14 St. at Large, p. 458) gives the alternative c
sonal service outside of the state, instead of publication, an
provides that service may be proved 'if made by any other p
than the sheriff by 'his affidavit thereof.' Nothing is said as
character of the officer before whom this affidavit is to be made.
sole question, therefore, is whether the affidavit of Miguel Sbe
made in the island of Majorca, Spain, before one authorized
there to administer an oath. In other words, was it then an
an affidavit? There can be no doubt of this. Under the l
the United States in force in 1875, every consular agent is so em
ed, and his acts are to be given the same force and effect as tho
'notary public or any other person so authorized or competent
to in the United States.' Rev, (960) St. U. S. 1878, p. 311
affidavit is a formal, written or printed, voluntary, ex parte sta
sworn or affirmed to before an officer authorized to take it, to l
in legal proceedings.' And it must 'be sworn to before a con
person,—that is, before a particular officer or one of a par
class, where a statute or rule of court requires it; otherwise, bef
one authorized to administer an oath.' 1 Am. & Eng. Enc. La
308, 178. Our statute and rule of court in 1875 being silent as
character of the officer before whom the affidavit was to be mad
one authorized to administer an oath' could take and certify th
A number of cases from courts of recognized authority hav
cited supporting this view, and among them the following
rectly in point: Tucker v. Ladd, 4 Cow. 47; Wood v. Bank,
194, 200; People v. Tioga Common Pleas, 7 Wend. 516; Bank
den, 3 Hill, 461. The very question as to affidavits was made
ruled upon in these cases. The case of Woolfolk v. Manufa
Co., 22 S. C. 337, relied on by defendant, not only does not
with, but really is in line with, the decisions above referred to,
reason that the statute in that case required that, before a deed
be recorded, it must be proved by the oath of a subscribing v
the court holding that the provisions of the law with regard to
davit before a magistrate related only to a deed executed
the state, and that the act of 1788 had specially provided for th
of a deed executed out of the state, which should be by a *d*
and that, therefore, there being a special provision of the sta
other mode could be made use of. The whole thing was st
and the court so stated. In the case of Armstrong v. Austi
ever, decided by Chief Justice McIver, and reported in 22 S.
the court refers to this very fact. In that case the witness
the affidavit did not sign the same, and it was urged that the
was bad. The case of Woolfolk v. Manufacturing Co. was ev

pressed upon the court, but the court replied that in that case there were the express terms of the statute; but there were no express terms of the statute as to the signing of the affidavit, but it was provided merely that the affidavit should be made by a subscribing witness, and they therefore held the affidavit to be sufficient. These two cases point to the very conclusion reached in the present decree, and are indications of the intention of the court to give the performance of acts under statutes a reasonable and liberal interpretation, unless the plain terms of the statute demand otherwise. In the case now at bar the statute uses the word 'affidavit,' and I am bound to avoid a construction which would practically contradict this word, and annul the statute so far as the relief of personal service outside of the state was concerned. There was no officer in Spain in 1875 qualified by the laws of South Carolina to administer an oath, for a *dedimus* was directed to prove a deed alone. The statute clearly intended to allow personal service outside the state in foreign countries, and provided that it could be proved by the 'affidavit of the persons making it.' I cannot, in the absence of a decision in this state so holding, and in the face of decisions to the contrary elsewhere, construe away these provisions of the statute, and the relief they afford, and the rights vested thereunder. I hold, therefore, that the proof of service in 1875 was legal and valid.

"It would seem almost useless to repeat and adopt the other positions of the plaintiff, but as they all are, in my opinion, equally conclusive and convincing, it becomes my duty to refer to them, although briefly.

"The second position taken, and in which I concur, is that even if the original affidavit was defective, because not taken before an officer qualified by the laws of South Carolina to administer an oath, then this was a mere irregularity, which cannot be attacked collaterally, and after such a length of time. There is a presumption in favor of the regularity of judicial proceedings, and this presumption becomes conclusive after lapse of time, and without objection being made. And there is also a great distinction between defective service and total want of service. In one case the judgment is void, while in the case of defective service the judgment is valid until set aside in direct proceedings, and is proof against collateral attack. 22 Am. & Eng. Enc. Law, 161. Only a jurisdictional defect, appearing on the record, can be taken advantage of in a collateral proceeding. Darby v. Shannon, 19 S. C. 526; Hahn v. Kelly, 94 Am. Dec. 764. From the number of authorities to this effect in our state, the citation of only a few of them will be necessary to support this conclusion: Tederall v. Bouknight, 25 S. C. 275, 279, 282; Genobles v. West, 23 S. C. 154,

167; Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829. The latter cas
particularly in point, inasmuch as in it the court stated that the p
chaser at a subsequent judicial sale could not attack for irregula
some prior proceeding affecting the title to the property purchas
and the court held that, notwithstanding a good deal of irregula
in the former proceedings, the purchaser, under the new proceedi
was not in a position to question it. The language of the cour
instructive on this point, and is as follows: 'There was an orde
sale, which it is the settled policy of the state to maintain if it
be done without violating principle or doing injustice. There wa
judgment rendered by a competent court having jurisdiction of
subject-matter, and that presumes that all things were rightly d
Objections to mere irregularity in the proceedings will not be he
to impeach a judgment. Nothing, in (961) fact, will be allowed
laterally to invalidate a title acquired under it, but jurisdictional
fects which appear in the record.' This being the case, the ques
is whether the alleged defect with regard to the proof of service
Sbert, in 1875, was jurisdictional, or a mere irregularity. I find f
cases cited that almost everywhere it has been held that an alle
defect of this sort, even if it be a defect at all, is treated as a mer
regularity, which can be amended at any time. See cases of As
ance Co. v. Everhart's Adm'r (Va.) 14 S. E. 836; Turner v. Hol
13 S. E. 731, 109 N. C. 182; Shufeldt v. Barlass (Neb.) 51 N. W.
cited at page 5594, Am. Dig. 1892; Railroad Co. v. Ashby's Trus
(Va.) 9 S. E. 1003; Tyler v. Jewell (Ky.) 11 S. W. 25, cited at p
4108, Am. Dig. 1889. In the case of Forbes v. McHaffie (Neb.)
N. W. 721, it was held that although, under the Nebraska statut
special deputy appointed to serve a summons was required to m
his return under oath, jurisdiction was obtained if no objection
made to the return on that ground, although the return was not u
oath. In the case of Hill v. Gordon, 45 Fed. 276, where there
personal service on the defendant, but the return was in the nam
the special deputy marshal, instead of the marshal, as required
the statute, this was decided to be a mere irregularity, to which
objection could not be raised by strangers to the judgment. It t
appeared that the original suit was brought at common law in 1
while the new suit, between different parties, was brought in 1
The language of the court is peculiarly appropriate to the present
and is in the following words: 'This court will not, at this late
say that the court who tried the cause was so remiss in its duty a
allow judgment to be entered in a cause in which the court ha
jurisdiction. * * * It is contended by the complainants that
court had no jurisdiction of the person of the defendant, John

Matthews, because the return upon the original writ was made in the name of a special deputy United States marshal, and not in the name of the marshal. There was personal service upon the defendant, and the making of the return in the name of the deputy was, at the most, only an irregularity, which the defendant above could take advantage of in the original proceedings, and cannot be raised by strangers to the judgment. I am of opinion that the court had jurisdiction, both of the subject-matter and the person of the defendant.' These cases seem to be overwhelming, and in the language of Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829, it is evident that 'there was no surprise to the infants. They had their day in court. They derived full benefit from the proceeding, and they are not here making complaint.' The proof of original service in the old suit, therefore, even if defective, was only such an irregularity as cannot be questioned in this present proceeding, twenty-one years afterwards.

"But supposing, for the purpose of argument, that the defect was not a mere irregularity, then the next question would be whether or not the new proceedings, brought in 1895, cured the defect, and are binding in the present suit on the purchaser. I am of opinion that such is the case. It will be remembered that in 1895 new proceedings were brought against all the former defendants, and that, after due service by publication, judgment was taken against them, the court holding that the original service and proceedings had been valid, and also further confirming and validating the title. We have already seen that the record in one suit cannot be questioned collaterally in another suit, by third parties, save for jurisdictional defects appearing on the face of the proceedings; and the further rule is that facts alleged and confirmed by judgment in one suit cannot be rebutted by parol testimony, at the hands of third parties, in another suit. And the courts hold that if it appears and the record shows in a former suit that all of the parties were of full age, and judgment was duly had, third parties in a collateral subsequent suit cannot set up or prove the allegation that some of these parties in the former suit were minors. Unless the record in the first proceeding shows the contrary, it must be judicially held that the court had acquired the necessary jurisdiction, and had before it parties against whom it could pronounce its judgment. Hahn v. Kelly, 94 Am. Dec. 764. Unless the contrary appeared, therefore, on the record of 1895, the fact of all of the defendants having been of full age, and of all of them having been alive, is presumed, as matter of law; and the judgment of the court thereon cannot be contradicted by parol testimony in a collateral proceeding, nor can allegations to this effect be permitted. Tederall v. Bouknight, 25 S. C. 275. In that case it appeared that there had been

in a former proceeding a partition in the probate court, regula its face, in which, so far as the record went, all of the parties wer full age, and had been served. In the subsequent proceeding, bro some years after, the court held, at page 280, that the defend could not be permitted to show that one of the parties to the fo suit in the probate court was then a minor, and not properly be the court; laying down the doctrine that the judgment in the fo suit, regular on its face, must be taken as an absolute verity, and yond the reach of contradiction or assault in a collateral manner. the proceedings in 1895, the record to formal judgment and d is regular, and is presumed to show that all the parties were b the court, and that all were alive, and that all were of full age. present proceeding, which is a collateral one, cannot impeach former record by parol testimo-(962)ny, nor can such facts be all for that cannot be alleged which should not be permitted to be pr I cannot, therefore, in this subsequent proceeding between parties, permit the defendant collaterally to impeach the reco the confirmation suit of 1895, by alleging, and therefore obtainin it were, permission to prove, these facts as to minority and d which do not appear in, and would contradict, the former record. original parties, in a direct proceeding, might be suffered to stat prove them; but this dangerous privilege should never be accord strangers in a collateral suit. I feel, then, constrained to ignore facts, and strike them out of the answer.

"Lastly, I regard the bond as due, by its own terms. Fu ruling on the part of the court would seem almost superfluous. I am constrained to say that I am not by any means clear tha defendant had, under the terms of his bond, the slightest right terpose any defenses whatsoever, although I have, it is true, lis to and discussed them all. The bond of the defendant states t will be paid as soon as any court of 'competent jurisdiction' either hold the original title to have been good, or make it go far as the old alleged defect was concerned. Now, in 1895 a sui brought against the parties in the old suit, in the court of co pleas for Charleston county,—this very court, a court of com jurisdiction; and, after proper and regular proceedings, the cou its order, adjudged and decreed that the former proceedings had valid and regular. In other words, it 'held' the former title to been 'good.' It is shown that third parties cannot question thi laterally; but, in addition to this, defendant did not even sta the position of an ordinary third party, for he has in his bond ex ly agreed that if any court of competent jurisdiction were to ho title good, under the original proceeding, he would pay his bon

court of competent jurisdiction—this very court—has done this, and the decree stands of record here; and therefore the bond is payable. It is evident that the court which passed the decree in 1895 was a court of competent jurisdiction, and its judgment by default concluded everything raised by the proceedings. Van Fleet, Coll. Attack, § 17; 21 Am. & Eng. Enc. Law, 268, 269.

"It is not here contended that, so far as the confirmation and making of the title good in 1895 is concerned, the judgment of the court could bind parties not before it; but the question as to whether the title had formerly been good was also raised and passed upon, and decision was made on that very point, and it was made by a court of competent jurisdiction. It is in all other proceedings, and as to everybody except heirs who were not parties to the former suit, absolutely conclusive; and even as to these heirs, while they might question the correctness of this conclusion of the court in some subsequent proceeding, still, if the court reversed the decision made at that time, it would save the intervening rights of third parties. It may be urged by the other side that, while a court of competent jurisdiction has held this title to have been valid, the supreme court might not agree with it. This, however, I cannot regard. In making their bond, they should then have stated that they would pay it when a court of competent jurisdiction and of last resort had declared the title to have been formerly valid. They did not see fit to do this, and a court of competent jurisdiction having passed on the very question set out in the bond, and having declared the former title to have been valid, the bond is due by its own terms, and its payment cannot be resisted by the defendant.

"For all these reasons, I am thus unable to apprehend any defense in the answer, and must therefore grant the demurrer, and strike the answer out, giving the necessary default judgment in foreclosure. It is therefore ordered, adjudged, and decreed that the answer herein be stricken out, as not containing or stating facts sufficient to constitute a defense. Further ordered, adjudged, and decreed that plaintiff do have judgment by default against the defendant for the amount of the bond, eight thousand dollars, with interest at the rate of six per cent. per annum from the 17th day of July, 1895, and the costs of this proceeding. Further ordered, adjudged, and decreed that the defendant, and all those claiming by, through, or under him, be barred of all equity of redemption or other interests in the said mortgaged premises; and that the said mortgaged premises be sold at public auction, by G. H. Sass, Esq., one of the masters of this court, after due advertisement, according to law, such sale to take place before the post office at Charleston, S. C., on Tuesday, the 3d

day of August, 1896, at eleven o'clock a. m.; the terms of such
to be one-third cash, the balance to be secured by the bond of the
chaser and a mortgage of the premises, such bond to be payable
and two years from date, and to bear interest from the day of
at the rate of seven per cent. per annum, payable annually; the
chaser also to insure the property, and assign the same as fur
security for his bond, and also to have the option of paying cash
the premises; the purchaser to pay the master for papers, and als
pay all unpaid state and city taxes payable during and after the
1896. It is further ordered, adjudged, and decreed that the
master shall, after paying all the costs and expenses of these
ceedings, and of the sale ordered hereunder, pay and discharge in
with all interest thereon, the bond held by the plaintiff, and that
then do pay over the balance of the purchase money to the defend
herein.

"The following is a description of the (963) premises herein
dered sold: All those two wharf properties in the city of Charles
formerly known as Hunter's North and South Wharves, on the
side of Concord street, being lots known as lots Nos. 55 and 56 i
plan of Laurens Marshes, made by E. B. White, surveyor, recor
R. M. C. O., Charleston county, in Plat Book A, page 156; measur
on the north line 525 feet, on the south line 492 feet, on the east l
together 328 feet, and on the west line together 248 feet, more or le
butting north on lot 57, and south on lot 54, in said plat, west on C
cord street, and east on the channel of Cooper river,—the said pr
erty being the same that was conveyed to the Marine Wharf and St
age Company by Ch. Richardson Miles, master, by deed dated 3
of July, 1890, and of record in the R. M. C. O. for Charleston coun
in Book B, 21, page 66, and having been since that time known
Marine Wharf, and being fully delineated and set out in a plat
the same made on September 7th, 1892, by Louis J. Barbot, city en
neer, and attached to a conveyance from the said Marine Wharf a
Storage Company to Charles Parsons, Jr."

From this decree the defendant appealed as follows:

"Please take notice that the defendant intends to appeal from t
decretal order of his honor, Judge Benet, made in this cause, a
dated 12th June, 1896, and also that the defendant excepts to said
cision on the following grounds:

"First, Because his honor erred in finding that to the suit
plaintiff against Catalina Zanoguera *et al.*, commenced in July, 18
that all the heirs of Zanoguera were made parties defendant, and th
the record shows that they were all duly and regularly served by pu
lication and mailing of the summons and complaint,—but, on the co

trary, should have found that the following heirs of said Zanoguera were not duly made parties, and were not duly served, viz.: Mary and Antonio, who were then deceased, and Joanna, who was a minor, and for whom no guardian *ad litem* was appointed.

"Second, Because his honor erred in finding that in July, 1895, there was obtained an affidavit from all of the heirs of Zanoguera, then in the Spanish island of Majorca, to the effect that all of the parties had been served in the former cause, but his honor should have found that such affidavit was made by five out of the eight heirs; that one of these (Joanna) was under age; and that, of the rest, Mary and Antonio were dead; and that they and Miguel did not sign the affidavit.

"Third, That his honor erred in finding with regard to the case of Holmes vs. Zanoguera, in 1875, that the widow and the administrator and the guardian went into court asking that the property be sold, but should have found that the administrator was the sole plaintiff, and all others were named as defendants.

"Fourth. That his honor erred in finding with regard to the said case of Holmes vs. Zanoguera that it being necessary to serve the minors by service of the summons and complaint upon the mother of the minors, and upon the general guardian, and upon the minors themselves, that 'all this was done' but, on the contrary, should have found that there was no proof of the service of the summons upon the minors, as the alleged affidavit of Miguel Sbert before the consular agent was not the proof required or allowed by the laws of this state; also, that his honor erred in holding elsewhere in the decree that such service was proved by the affidavit of Miguel Sbert.

"Fifth. Because his honor erred in holding that the record in Holmes vs. Zanoguera, the suit of 1875, shows a case with all the parties apparently before the court, including the minors, but, on the contrary, he should have found that it appears on the face of the record of said suit that there is no legal proof of the service of the summons on the said minors, the only proof thereof being the said alleged affidavit of M. Sbert, taken before a U. S. consular agent, and not according to the laws of this state.

"Sixth. Because his honor erred in holding that the answer herein practically admits that the affidavit of July, 1895, cured the defects in the title as to the adults who signed the same, and that all questions as to them are eliminated, but, on the contrary, should have held that an affidavit so taken after judgment in the cause of Holmes vs. Zanoguera, in 1875, was not sufficient to amount to a proof of service, even with regard to the adults who signed the same.

"Seventh. That his honor erred in holding that the fact that

Joanna was not of age when she signed the affidavit, in 1895, wo not seem to offer any difficulty, but, on the contrary, should have h that such affidavit of a minor would not be equivalent to actual le service on the minor to the suit in 1875, nor was it any proof there

"Eighth. That his honor erred in holding that Joanna was bo by the decree of 1895, but should have found that she was not sh to be then of full age, and that no guardian *ad litem* had been pointed for her.

"Ninth. That his honor erred in holding that, if Joanna w minor when the decree of 1895 was taken, she was a party to the and the decree against her, while possibly voidable as to her in a rect proceeding, is valid and binding as to third parties (she woul therefore barred and bound), but, on the contrary, should have h that it is the duty of a purchaser to see that all proper persons properly made parties to a suit affecting the title which he purch and that he is not bound unless all proper persons are properly m parties; and Joanna was not properly made a party in the caus 1895, because she was (964) under age, and no guardian *ad litem* appointed for her.

"Tenth. That his honor erred in holding that the suit of bound the interests of the parties if they were then of full age before the court, and so bound the interest of Miguel Zanoguera, should have held that the said suit presented no case stating a c of action as to which the court had any jurisdiction; i. e. that the ject-matter of the suit presented no cause of action, and so nei Miguel nor any of the other parties were bound thereby.

"Eleventh. That his honor erred in holding that on the d of Antonio, intestate, his interest descended to his mother and bro and sisters, and all of them were before the court in 1895, and were barred and bound by the proceedings then taken, but sh have held that there was no proof that Antonio was intestate, no the time of his death; that, when he died, he was not bound by decree in the suit of 1875; that if he was interstate when he that then what of his interest went to his mother and brother sisters was interests in them accruing to them after the decre Holmes vs. Zanoguera, and could not be affected by the decre that suit, nor by that of the suit of 1895, but were independent in them, which never have passed to the defendant; that, if he after Mary, then the infant child of Mary is one of his heirs, that child's title never passed to the defendant herein; and, i died before her, that child still has the part of his interest that it from its mother.

"Twelfth. That his honor erred in holding, in considering

case as to Maria and her share, that, the oath as to proof of service by M. Sbert before the U. S. consular agent, in 1875, was originally a valid affidavit, but should have held that it was not an affidavit nor proof of service required or allowed by the laws of this state, and that such oath was not an affidavit recognized by our law.

"Thirteenth. That his honor erred in holding that the proof of service in 1875 was legal and valid, but should have found the contrary.

"Fourteenth. That his honor erred in holding that, even if the original affidavit of service of 1875 was defective, then this was a mere irregularity, which cannot be attacked collaterally, and after such a length of time, but should have held that it is the duty of a purchaser taking title coming under a sale by the court to see that the court has jurisdiction of the subject-matter and of the parties, and that, if the court does not have jurisdiction in either respect, he is not bound to take such a title, and he is entitled to have it shown that the court has jurisdiction; and, further, that, with regard to the suit of 1875, the want of jurisdiction of the minors was apparent on the face of the record of that suit; and that there can be no presumption in favor of the regularity of the decree in that suit, when the record itself discloses the defect.

"Fifteenth. That his honor erred in holding that, even if the defect of 1875 was not a mere irregularity, the suit of 1895 cured the defect, and is binding in the present suit on the purchaser, but should have held that the suit of 1895 had and could have no effect in curing any defect in the suit of 1875, because of the named parties thereto, at least two, viz. Antonio and Mary, had previously died, and Mary had died in April, 1890, leaving a young infant child, not named in the complaint, and so could not have been served by publication or in any other way, and that to such proceedings this defendant was not a party, and that the judgment in that cause was not the judgment of a court of competent jurisdiction, because as to, at least, the said two named parties, the court had no jurisdiction, nor did it undertake to exercise any jurisdiction over the interests which descended to their heirs; and, further, his honor should have held that in this present suit it was a good defense to the bond to show that the title had not been held or made good by a court of competent jurisdiction, and that, in maintaining that defense, it was competent for him to show that for any reason the court had no jurisdiction of the cause or parties, or any of them, in the suit of 1895,—and that, whether the want of jurisdiction appeared on the face of the record or not.

"Sixteenth. That his honor erred in holding that a court of competent jurisdiction has decreed the title to be good by the decree of

1895, but should have held that it had no jurisdiction as to said two heirs then deceased; and such want of jurisdiction can be set up by defendant in this case under the terms of the bond sued on, and whether or not such want of jurisdiction appears on the face of the record or not.

"Seventeenth. That his honor erred in ordering the answer to be stricken out, and in giving judgment for plaintiff, but should have overruled the demurrer to the answer, and should have awarded judgment in favor of the defendant.

"Eighteenth. That his honor erred in holding that all of the heirs of Zanoguera who had been defendants in the former proceeding of Holmes vs. Zanoguera were all duly and regularly served by publication and mailing of the summons and complaint in the suit instituted by the Marine Wharf and Storage Company in 1895, it being alleged by the answer and admitted by the demurrer that Maria, one of the heirs of Zanoguera, and a party to the original proceedings, had died in April, 1890, leaving, surviving her, a husband and child, who were not parties to the second suit.

"Nineteenth. That his honor erred in finding that the admission made by Joanna, a minor, in 1895, that she had been served in (965) the original proceedings, was the evidence of service in said proceeding required by the law of this state.

"Twentieth. Because his honor erred in holding that it was not competent for the defendant to allege or prove that necessary parties had not been made in the suit instituted in 1895 for the confirmation of plaintiff's title.

"Twenty-First. Because his honor erred in holding that the decree made the confirmation proceedings of 1895 was the decree of a court of competent jurisdiction, holding the plaintiff's title to be good, although the court had not acquired jurisdiction over the persons of several of the parties interested in the property."

Lord & Burke, for appellant. Smythe, Lee & Frost, for respondent.

JONES, J. This is a suit for the foreclosure of a mortgage of real estate executed by defendant to plaintiff, July 17, 1895, to secure a bond of same date for the purchase money, conditioned to pay a certain sum, with specified interest, five years from its date, or as soon before that time as the title to the mortgaged premises shall, by a court of competent jurisdiction, be held or made good, so far as an alleged defect alone is concerned. Suit was commenced in November, 1895. The alleged defect is set forth in the bond, as follows: "That in the case of G. S. Holmes, administrator, against Zanoguera *et al.*,

filed and of record in the court of common pleas for Charleston county, in which suit said lot 55 [the mortgaged premises] was sold, the proof of service upon certain minor defendants was made by the affidavit of Miguel Sbert, the person serving said minors, before a consular agent of the United States in the island of Majorca, kingdom of Spain, which said affidavit is alleged to be defective and not taken before the proper officer." The complaint, after the usual allegations in such cases, further alleged that the alleged defect does not, and never did, affect the validity of the title to the said property, but that, in order to further assure and remove all questions from the same, the plaintiff obtained from said Zanoguera heirs, on the 30th July, 1895, an affidavit before the Unites States consular agent in Majorca, Spain, to the effect that the service had actually been made by the said Miguel Sbert (since deceased), as set out in the former affidavit of said Sbert in the case of Holmes, administrator, against Zanoguera, in 1875; and that said affidavit of 30th July, 1895, had been forthwith filed in the records of said cause *nunc pro tunc*, as further proof of service. The complaint further alleged that, in order to still further remove all shadow of the alleged defect from said title, the plaintiff filed, in the common pleas court for Charleston county, summons and complaint against the heirs at law of Sebastian Zanoguera, wherein it referred to the suit of Holmes, administrator, against Zanoguera, and the alleged irregularity in the proof of service, and prayed the court to declare the said proceedings and proof of service regular and valid, and no cloud on the title of this plaintiff, or else confirm the said former proceedings; that on the 7th day of September, 1895, Judge O. W. Buchanan therein decreed the proceedings in the case of Holmes, administrator, against Zanoguera, to have been valid and binding, and further confirmed and ratified them in all respects and vested and validated in plaintiff the title to the property in question, and that said judgment stands of force and unappealed from. The complaint then alleged that the title to the mortgaged property has been, in a court of competent jurisdiction, held and made good so far as the alleged defect referred to in said bond is concerned, and that the court should declare the condition of said bond and mortgage broken. To this end the complaint prayed, and for foreclosure. The answer denies that the condition of said bond has been broken, and alleges that the matters referred to in said bond did and do affect the validity of the title of the said premises; that in a chain of title is a conveyance of said premises by A. J. White to Sebastian Zanoguera, dated 27th March, 1872; that, under proceedings for settlement of the estate of said Sebastian Zanoguera, the said premises were conveyed by the sheriff of Charleston county to Robert

Hunter, January 6, 1876; that, on settlement of the estate of Rob Hunter, said premises were conveyed by a master of said court the plaintiff, July 31, 1890, and that on 17th July, 1895, plaintiff c veyed same to defendant; that in said proceedings for settlement the estate of Sebastian Zanoguera, who died intestate, his widow a seven minor children were named as parties, but there is no pr of the service of the summons on the said infant defendants, who w then aged about 1, 3, 4, 6, 9, 13, and 16 years, respectively, except affidavit of service before a United States consular agent, as set in the bond annexed to the complaint. As to the affidavit of July 1895, the answer admitted that such an affidavit was obtained fr some of the heirs of said Sebastian Zanoguera, but alleged that s of the heirs, Maria, Antonio, and Miguel, did not sign the affidavit, alleged on information and belief that Maria and Antonio are d and that Joanna, who did sign the affidavit, was then under 21 y of age. As to the proceeding in the case of the Marine Whar Storage Company against Catalina Zanoguera and others, in 1 referred to in the complaint, the answer alleged that at that time said Maria was dead, having died in April, 1890, leaving, as her h her husband and a child, now about six years old, and that these h were not parties to said proceedings. Plaintiff demurred to the swer, on the ground that it did not state facts sufficient to consti a (966) defense. His honor, Judge Benet, hearing the cause, tained the demurrer, and made decree for foreclosure. This de and the grounds of appeal therefrom will be found set out in the port of this case.

The exceptions, in ultimate analysis, raise in general one con ling question, viz. whether the condition of said bond had been br at the time of the commencement of this action. As shown by terms of the bond, it was payable (1) within five years from its d (2) or as soon before that time as the title to said premises shall l court of competent jurisdiction be held or made good so far as alleged defect alone is concerned. The action having been c menced within the five years, it remains to ascertain if a cour competent jurisdiction had, previous to the commencement of action, held or made good said title. The record in the case of Marine Wharf & Storage Company against Catalina Zanoguera, elder, Catalina Zanoguera, the younger, Elvira Zanoguera, M Zanoguera, Antonio Zanoguera, Madilina Zanoguera, Miguel Z guera, and Joanna Minie Zanoguera, was made a part of the c plaint, and was not questioned by defendant, except as herein noticed, and shows on its face that the summons and compl therein were duly and legally served by publication, and due p

of same made. The court of common pleas for the county of Charleston, having power to hear and determine such a cause, having jurisdiction over the subject-matter, and complying fully with the statute as to service of summons by publication, was a court of competent jurisdiction. By its judgment, September 7, 1895, it declared the proceedings in the said cause of Holmes, administrator, against Zanoguera, "to have been valid and binding," and proceeded, further, to confirm and ratify the same in all respects, and declared the title to the property in question to be vested and validated in the plaintiff, etc. Defendant's title to the premises, as grantee of the plaintiff, was therefore held good on September 7, 1895, by a court of competent jurisdiction, when, by its terms, the bond became payable.

So far as the question before us is concerned, it makes no difference that it appears *dehors* the record that two of the Zanoguera heirs, Maria and Antonio, were dead at the time of the proceedings in 1895, Maria leaving a husband and infant child, who were not parties thereto; nor is it material that Joanna was under 21 years of age on the 30th July, 1895, when the affidavit was signed. It does not appear that she was not 21 years old at the commencement of the proceedings later, in 1895, and the presumption is that she was. The judgment of Judge Buchanan, September 7, 1895, was regular on its face. Nothing whatever appears in the record to impeach it. It is not void, and cannot be assailed collaterally, especially by defendant. Darby v. Shannon, 19 S. C. 526; Hunter v. Ruff (S. C.) 25 S. E. 74. In reaching the conclusion that the proceedings, including the proof of service, on all the Zanoguera heirs, in the case of Holmes, administrator, against Zanoguera, was valid and binding, Judge Buchanan must have decided that the proof of service of the summons and complaint on the Zanoguera heirs, October 6, 1875, by the affidavit of Miguel Sbert, before Ernesto Canut, United States consular agent, was a compliance with the statute, or that the proof of service was a mere irregularity, which was cured by the affidavit of July 30, 1895, filed with the record. In either view, his judgment was the judgment of a court of competent jurisdiction, holding the title in question to be good. This being so, the bond became payable on the filing of this judgment.

Having reached this conclusion, we think it quite unnecessary to consider the other matters so ably and satisfactorily discussed in the opinion of Judge Benet. We concur fully with the circuit court that the proceedings in the case of Holmes, administrator, against Zanoguera *et al.*, were regular, valid, and binding on all the minor defendants therein. It will be observed that the bond itself and the pleadings assume as true that Ernesto Canut was a consular agent of

the United States in Majorca, Spain. The alleged defect was t
Ernesto Canut, though United States consul, was not authorized
administer the oath to the affidavit of Miguel Sbert, who served
minors. The code (section 158), as it stood at that time, required t
in addition to publication, in the case of minors who could not
found within the state, service of summons and complaint should
made by delivering a copy thereof to the minor personally, and
under the age of 14 years, also to his or her father, mother,
guardian, etc. It further provided that "proof of such perso
service shall be made by affidavit of the party delivering the co
summons and complaint properly authenticated." An "affidavit"
defined in 1 Am. & Eng. Enc. Law, p. 307, to be "a formal writ
(or printed) voluntary *ex parte* statement sworn (or affirmed) to
fore an officer authoribed to take it, to be used in legal proceeding
Unless a statute or rule of court otherwise requires, any one authori
to administer an oath may take an affidavit. Id. p. 309. In the
sence of some statute or rule of court providing otherwise, proof
service on a nonresident may be made by affidavit taken before a
officer qualified by law to take affidavits where the affidavit is ma
The officer's signature and seal is a sufficient authentication, unl
some statute or rule of court requires further authentication. In t
case the affidavit contains all the requisites of an affidavit prope
authenticated if Ernesto Canut, conceded to have been at the tim
United States consul at Majorca, Spain, was qualified to adminis
such oath. That he was so qualified under the laws of the Uni
States is shown in Rev. St. U. S. 1878, p. 311, wherein every consu
agent is "authorized to (967) administer to or take from any per
any oath, affirmation, affidavit, or deposition, and to perform a
notarial act which any notary public is required or authorized
law to do within the United States. Every such oath, affirmation, a
davit, deposition and notarial act, administered, sworn, affirmed, tak
out or done by, or before, any such officer, when certified under
hand and seal of office, shall be as valid and of like force and eff
within the United States, to all intents and purposes, as if admi
istered, sworn, affirmed, taken out, or done by before any other pers
within the United States, duly authorized and competent thereto
This act was passed in 1856, was therefore in force when the provisio
of the code as to proof of service on nonresidents was adopted, a
we assume the legislature had in mind the right of a United Stat
consul to take an affidavit when this provision was adopted. In 18
section 159 of the code was amended, giving more specific directio
as to the proof of service of process when made out of the state, a
it is therein provided: "If [the service] is made without the limi

of the United States, [prof thereof may be made] before a consul or vice consul or consular agent of the United States who shall use in his certificate his official seal." The case of Woolfolk v. Manufacturing Co., 22 S. C. 337, cited in behalf of appellant, is not in conflict with the view here announced. In that case it was held that, under our registry laws in force in 1820, a deed executed in South Carolina, and proved before a magistrate in Georgia, was not properly probated for record, because the act required such a deed to be probated "before a judge of the supreme court, or a magistrate out of the court." The court held that these words "meant officers of this state, commissioned by this state, and acting within this state." In the case at bar no officer was specified as the person who should take the affidavit.

If the proceedings in 1875 were not defective, it becomes unnecessary to consider what curative effect subsequent proceedings have thereon. The judgment of the circuit court is affirmed.

MARSHALL v. CRITICO, (1808, Great Britain)
9 East 447.
Lord Ellenborough, King's Bench.

[Counsel for defendant claimed that as a consul-general he was privileged from arrest even though he had been dismissed before his arrest considering that he was not yet informed of his dismissal and continued to act as consul-general.—ED.]

(Extract) This is not a privilege of the person, but of the state which he represents. And that state having some months before devested him of the character in which he claims the privilege, and appointed another person here to exercise it; there is no just reason why the defendant should not be subject to process as other persons; nor for the state, by which he had been so dismissed from his employment, to take offence at his arrest.

MARSTON v. UNITED STATES, (1896, U. S.)
71 Fed. Rep. 496.
Woods, Circuit Court.

[American consul removed from office before end of fiscal year is only entitled to retain a part of the fees collected proportional to the part of the fiscal year during which he has held office.—ED.]

MARY, THE, See Wilson v. The Mary.

MARY FORD, THE, See M'Donough v. Dannery.

MATHESON v. CAMPBELL, (1895, U. S.)
69 Fed. Rep. 597.
Townsend, Circuit Court.

TOWNSEND, District Judge. (Extract) Final hearing on
for injunction and accounting. Complainant alleges infringement
patent No. 345,901 for naphthol-black color compound, granted J
20, 1886, to Meinhard Hoffmann and Arthur Weinberg, and assig
to complainant July 10, 1888.

A preliminary question suggested by defendant is whether an
signment which purports to have been executed before the cor
general of the United States of Frankfort-on-the-Main, Germany
sufficiently proved by the signature of said consul general and
United States consulate general seal. I think this proof is suffici
under the statutes of the United States and of the state of New Y
Rev. St. U. S. sect. 1750; Pharmical Ass'n v. Tilden, 14 Fed. 7
Houghton v. Jones, 1 Wall. 702.

MATHEWS v. UNITED STATES, (1887, U. S.)
123 U. S. 182.
Harlan, Supreme Court.

[Question of salary and involves no consular question.—ED.]

MATTHEWS v. OFFLEY, (1837, U. S.)
3 Sumn. 115; Fed. Cases 9,290.
Story, Circuit Court.

(122) (Extract) The next question is to the ruling of the lea
judge of the district court, in admitting the certificate of the
consul, stated in the bill of exceptions, as *prima facie* evidence o
the facts therein certified; whereas, the counsel for the original
fendant contended, and now contend, that it was not evidence, ex
of the refusal of the defendant to take the seaman on board.
fourth section of the act of 1803, after the provisions, which have
already alluded to, proceeds to declare; "And the certificate of
consul or commercial agent, given under his hand and official
shall be *prima facie* evidence of such refusal, in any court of
having jurisdiction for the recovery of the penalty aforesaid."
whole question turns upon (123) what is to be understood as inte
to be included in the statute. Is it the dry naked fact, that the m
refused to take a seaman on board, giving his name, at the re
of the consul, &c.? Or does the statute mean by the words "
refusal," a refusal under the circumstances stated in the prec
part of the section? My opinion is, that the latter is the true i

pretation of the statute. It meant to provide, that the certificate should contain and be evidence, *prima facie,* of all facts stated in the enacting clause of the section, which is necessary to bring the case within the penalty; for all those facts are indispensable to make it "such refusal" as the statute contemplates. Upon any other construction the enactment would be wholly nugatory for all the purposes of enforcing the statute; since every material fact to enforce the penalty must be proved *aliunde* the certificate. The statute placed confidence in the consul, as a public officer, bound to the performance of highly responsible duties, and meant to make his certificate the proper and ordinary proof, though not conclusive proof, of all the facts to sustain a suit for the penalty. That is to say, it meant that he should certify, that the seaman was a seaman of the United States, was destitute, that he requested the master of an American ship, bound to the United States, to take him on board and transport him to a port of the United States, for the statute compensation, with a proviso that he should not be compelled to take more than two seamen for every one hundred tons burthen of the ship, and that he refused so to do. "Such refusal," and no other, would constitute an offence within the statute; and such refusal and no other is to be certified. Now, the present certificate contains the allegations of these necessary facts; and none other; and, therefore, it seems to me, that it was properly admissible, in the whole, according to the ruling of the district judge.

MILLER v. VAN LOBEN SELLS, (1885, U. S.—Paraguay)
66 Cal. 341; 5 Pac. 512.
McKee, Supreme Court of California.

(Syllabus) The privilege of a consul to exemption from liability to suit in the state courts is not a personal privilege which may be waived, and his privilege is not, therefore, waived by a failure to plead such exemption, in a suit against him in a state court, nor by reason of failure to set up the same until after judgment rendered against him.

MOORE v. MILLER, (1892, U. S.—Canada)
147 Pa. 378; 23 Atl. 601; 5 Moore 110.
Per Curiam, Supreme Court of Pennsylvania.

[Held, that the acknowledgment of a married woman before a United States commercial agent in Canada, conforms to statutes and acts of state legislature and is sufficient.—ED.]

MORRIS v. CORNELL, (1843, U. S.)
1 Sprague 62, Fed. Cases 9,829.
Sprague, District Court.

(65) (Extract) The next allegation against the respondent is, that

he prevented the libellant at different ports, from laying his complaints before the American consul. This right is secured to every seaman by the statute of 1840, ch. 23, and if the consul be an upright and independent officer, it may be of immeasurable value to the oppressed and friendless mariner in distant regions. It may be called the *habeas corpus* of the seaman, and the court will carefully and vigorously guard its inviolability.

MOSBY v. UNITED STATES, (1888, U. S.)
24 Ct. Cl. 1.
Weldon, Court of Claims.

[Official fees—appealed see U. S. v. Mosby.—ED.]

MOTHERWELL v. UNITED STATES, (1901, U. S.—Russia)
107 Fed. Rep. 437.
Dallas, Circuit Court.

[Affirms decision in U. S. v. Motherwell. Very able dissenting opinion of District Judge Bradford to the effect that the Russian in question should be considered a deserter.—ED.]

MOTT v. SMITH, (1860, U. S.)
16 Cal. 552.
Field, Supreme Court of California.

[Certificates of acknowledgment if purported to be by one authorized are *prima facie* evidence of execution of deed; so also *prima facie* evidence of the official character of persons giving them. No proof *aliunde* necessary of signature etc.

General designation in statute,—"any consul" embraces consuls of every grade.—ED.]

NECK, THE, (1905, U. S.—Germany)
138 Fed Rep. 144.
Hanford, District Court.

[As American seaman had been enrolled in violation of U. S. laws he was not member of crew and treaty does not give German consul jurisdiction.—ED.]

NEW CITY, THE, (1891, U. S.)
47 Fed. Rep. 328.
Hanford, District Court.

[Held, that where the British vice-consul, on the facts shown by

the shipping articles and on the *ex parte* statements of libellants, had refused to order payment to them of wages, the district court of the U. S. will dismiss the libel—Waitshoair v. The Craigend, 42 Fed. Rep. 175 distinguished—there was no protest of consul in that case—U. S. courts exercise jurisdiction proceeding upon the idea of comity and to prevent a failure of justice but will not interfere when decision has been given by an authorized agent of the government of the country to which the vessel belongs.—ED.]

NEWMAN, EX PARTE, (1871, U. S.—Germany)
14 Wall. 152.
Clifford, Supreme Court.

[German consuls are by treaty given right to decide all disputes between seamen and master and this excludes admiralty courts' jurisdiction in case of a suit *"in rem"* for wages.—ED.]

NIBOYET v. NIBOYET, (1878, Great Britain)
L. R., 3 P. D. 52; 39 L. T. 486.
Sir Robert Phillimore, Probate Division, High Court of Justice.

(59) (Extract) It is to be observed, however, that in the present case the husband is not only a foreign subject, but is employed in this country in the discharge of duties belonging to a foreign public office which incapacitates him from acquiring a domicile in this country.

[This case was reversed in 4 L. R. P. D. 1, but the court did not declare that a domicile was acquired, but only that the court had jurisdiction for other reasons.—ED.]

NIBOYET v. NIBOYET, See Niboyet v. Niboyet.
4 L. R. P. D. 1.

NINA, THE, (1867, Great Britain—Portugal)
2 L. R. P. C. 38.
Lord Romilly, Privy Council.

(44) LORD ROMILLY: In this case their lordships, to avoid delay, intimated on the 20th of December last the nature of the report and recommendation they had agreed humbly to submit to her majesty; and her majesty was pleased, by her order in council of the same date, to approve of that report, and to direct that the same be carried into execution. Their lordships will now proceed to state more fully the reasons of that decision, which could not be stated at their last sitting before the adjournment of the committee.

This is an appeal from the court of admiralty, which dismissed the defendant from this cause and all further observance of justice therein, and condemned the plaintiff in the costs and damages con-
(45) sequent on the arrest of the vessel Nina, and also condemned him in the costs of the cause, and decreed the vessel to be released.

The vessel is a Portuguese vessel; the appellant is a British subject.

In April, 1867, the plaintiff commenced his services on board the Nina, then lying at Havana. He signed the articles in the common form which was supplied to him, a certified copy of which is in evidence. On arrival at Greenock, he alleges that he was, by D'Almeida, the nominal captain, turned out of the vessel without payment of what was due to him for wages and disbursements on account of the ship. Upon which he arrested her, but not prosecuting the case with sufficient diligence in Scotland, the suit was dismissed and the ship released. The Nina then came to Cardiff, where the appellant again arrested the ship, and instituted this suit in the admiralty court for wages and disbursements.

In accordance with the 10th of the rules of the admiralty court, published in 1859, notice of the suit was given to the Portuguese consul residing in this country; whereupon the consul sent in a protest, which, as far as is material, is as follows:

"I have inspected the certificate of the matricula, or roll, under which the Nina was sailing when she arrived at Greenock in the month of June, 1867; and I say that such matricula, or roll, purports to have been duly executed, as required by Portuguese law, before Fernando de Gaver e Tiscar, the consul-general of his most faithful majesty the king of Portugal at Havana.

"By the law of Portugal, the masters of all Portuguese vessels are required, before taking any officer or seaman to sea in a Portuguese vessel, to enter into a matricula, or roll, setting forth the voyage upon which the ship is about to sail, and that the officers and seamen about to proceed in her have agreed to serve for that voyage; and such matricula, or roll, is by Portuguese law the only mode in which a binding engagement can be entered into between the master of a Portuguese ship and his officers and seamen; and the matricula, or roll, when entered is signed by the master, officers, and seamen.

"The plaintiff in this action, Charles La Blache, has, by the said matricula, or roll, submitted himself to the provisions of the (46) *codigo commercial* of Portugal, by which the said Charles La Blache is restricted from taking any proceedings against the Nina or her master, and is required to submit any dispute or disputes that might

be existing between them either to the Portuguese vice-consul at Glasgow or to myself.

"The said Charles La Blache has not, as I am informed and believe, submitted, or attempted to submit, any dispute or disputes existing between him and the master of the Nina to the Portuguese vice-consul at Glasgow; and the said Charles La Blache has not submitted, or attempted to submit, any such dispute to me, which I would have readily entertained had the said Charles La Blache so done.

"The said Charles La Blache being subject to the provisions of the *codigo commercial*, and not having taken the measures adopted thereby to settle his dispute with the master of the Nina, I respectfully submit that it is not within the jurisdiction of this honourable court to entertain the claim of the said Charles La Blache; and, as the commercial representative of his majesty the king of Portugal, I consider it to be my duty to respectfully and formally protest against the exercise of the jurisdiction of this honourable court in or about the dispute existing between the said Charles La Blache and the master of the Portuguese ship Nina.

"F. I. VAN ZELLAR."

In this state of things several questions arise:

First; whether the court of admiralty has any jurisdiction at all in the case of a claim for wages by seamen for service on board of a foreign vessel.

Second; if it has such jurisdiction, whether, before exercising it, the court is bound to send notice of the case to the consul of the state to which the vessel belongs.

Third; if the foreign consul intervenes and protests, whether such protest operates *ipso facto* as an absolute bar to the prosecution of the suit, or whether the judge is to take into consideration the grounds and reasons advanced by the consul, and to determine according to his discretion whether, having regard to those grounds and reasons, it is fit and proper that the suit should proceed or be stayed.

(47) Fourth; whether the grounds and reasons put forward in the protest of the Portuguese consul in the present case are sufficient to satisfy the court that the suit ought to be stayed.

On the first question, no doubt whatever is entertained by their lordships. From the time of Lord Stowell down to the present, the court of admiralty has always asserted and exercised this jurisdiction. And if there remained any doubt on the subject, the 10th section of the act, 24 Vict. c. 10, expressly gives jurisdiction to the court of admiralty in the case of any ship, which, as the context, and the rest of the act plainly show, means the ship of any nation.

Nor have their lordships any more doubt upon the second question. It has been argued at the bar that the 10th section of the act, 24 Vict. c. 10, before referred to, has the effect of abolishing the practice enjoined by the 10th of the rules of the admiralty court of 1859, before referred to, of sending notice to the consul of the nation to which the foreign ship belongs. To this argument their lordships cannot accede. If it had been intended by the legislature to abolish the practice, that 10th rule, which it is to be observed has the force of statute, would have been expressly referred to by the act, and overruled. This is not done. The 10th section of the act is perfectly consistent with the rule. The only object of that section was to extend the jurisdiction which the court already had in the ordinary case of wages, to the cases of wages under special contract, and of disbursements on account of the ship.

With respect to the third question, their lordships are of opinion that the protest of the foreign consul does not, *ipso facto*, operate as a bar to the prosecution of the suit. The foreign consul has not the power to put a veto on the exercise of its jurisdiction by the court of admiralty. It is well observed by Dr. Lushington, in the case of The Golubchick, that the jurisdiction of the court of admiralty cannot depend upon the will of a foreign consul; that as he cannot confer the jurisdiction, so he cannot take it away. If the consul protests, but advances no reason, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the consul; and then the judge (48) of the court of admiralty is to exercise his discretion, and determine whether, having regard to those reasons, with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By descretion is meant, to use the words of Lord Eldon, in White v. Damon,[1] not an arbitrary, capricious discretion, but one that is regulated upon grounds that will make it judicial. That the exercise of this jurisdiction by the court of admiralty lies in the discretion of the court in the sense before stated, is established by a long line of authorities, from the time of Lord Stowell down to the present. They are all one way, and they are, in the opinion of their lordships, conclusive on this subject. And their lordships concur in the decision of the late learned judge of the court of admiralty in the case of The Octavie, that this discretion is not taken away by the 10th section of the admiralty jurisdiction act, already referred to.

Upon the first three questions, then, their lordships are of opinion that in the case of a suit for wages by seamen for service on

[1] 7 Ves. 35.

board of a foreign vessel, the court of admiralty has jurisdiction, but that it will not exercise it without first giving notice to the consul of the nation to which the foreign vessel belongs; and that if the foreign consul, by protest, objects to the prosecution of the suit, the court will determine according to its discretion, judicially exercised, whether, having regard to the reasons advanced by the consul, and the answers to them offered on the part of the plaintiff, it is fit and proper that the suit should proceed or be stayed.

Their lordships are further of opinion, that it makes no difference that the plaintiff is a British subject. It is the nationality of the vessel, and not the nationality of the individual seaman suing for his wages, that must regulate the course of procedure.

With respect to the fourth question which is, whether the facts and reasons adduced by the foreign consul are established, and, if so, whether they are sufficient to induce the court to stay the further prosecution of this suit; their lordships think that they are so. The plaintiff does not deny that the roll or matricula which he signed was in the usual form, and that it contained the usual printed conditions which now appear on the certified copy (49) produced in court. By these he agrees to be bound by the Portuguese law; the consul asserts the law to be, that in case of difference between the seamen and the captain the case shall be determined by the Portuguese consul residing in the country where the ship is arrested. The consequence is, that he is the judge to determine the contest between the plaintiff and defendant, and he is ready and willing to hear and dispose of the case. No evidence is given to contest the accuracy of this statement, and this being so, their lordships are of opinion, that the plaintiff has agreed to refer such matters to the decision of the Portuguese consul resident here, and that this constitutes a sufficient ground to induce the learned judge of the court of admiralty to come to the conclusion that, in the proper exercise of his discretion, this suit should not be proceeded with.

It must be a very strong case in which their lordships would be disposed to overrule the discretion of any judge which had been *bona fide* exercised on judicial principles, and they are of opinion that the decision of the learned judge is correct in dismissing the cause and releasing the vessel; but the decree in the court below proceeds to award costs and damages to the defendant against the plaintiff. Their lordships are unable to discover on what principle this can be rested. The question in the court below, and now before their lordships, is not whether the plaintiff was right in his suit; for the suit has not properly come to any hearing on the merits. The evidence necessary for arriving at a decision on the merits has not been produced. The

only question properly before the court below was, whether the suit instituted by the plaintiff should be allowed to proceed or not; in other words, whether the facts and reasons set forth by the Portuguese consul were sufficient to induce the court to refuse to allow the suit to proceed, and these facts and reasons were the only matters which could be properly contested in the court below. The learned judge arrived at the conclusion, as their lordships think correctly, that the suit should not proceed; but that very circumstance made it impossible for the court to come to a safe and satisfactory conclusion as to what would have been the result if the suit had been allowed to proceed, the proofs on both sides given in the usual manner, and the cause heard on the merits.

(50) Their lordships, therefore, are unable to concur with the learned judge of the court of admiralty in that portion of his decree which fixes the plaintiff with the payment of costs and damages, and have, therefore, humbly reported to her majesty that the decree of the court of admiralty be varied by striking out of it so much as relates to such costs and damages. The decree runs thus: Her majesty dismisses the defendant from this cause and all further observance of justice therein, and decrees the said vessel to be released; but their lordships do not think fit to make any order as to costs, either in the court below, or in the appeal to her majesty in council.

Solicitors for the appellant: Cotterill & Sons.

Proctors for the respondent: Clarkson, Son, & Cooper.

NORBERG v. HILLGREU, (1846, U. S.—Sweden)
5 New York Legal Observer 177.
Jones, New York Supreme Court.

Where an action was brought in the Marine Court for seaman's wages earned on board of a Swedish vessel, and judgment was obtained thereon:—It was held, (reversing the judgment of the court below) that the case came within the provisions of the treaty between this country and the government of Sweden and Norway, and that the claim was, therefore, only cognizable before the consul of the country to which the vessel belonged.

Error from the marine court. The circumstances of this case sufficiently appear in the opinion delivered by the learned chief justice.

F. S. Stallknecht, for the plaintiff in error.

A. Nash, for the defendant in error.

JONES, C. J. This case comes before us on *certiorari* to the marine court. The action is assumpsit brought by Hillgreu, plaintiff in the court below, for seaman's wages. The defense that was inter-

posed, and the only defence on which any reliance is placed, was that these wages were earned on board of a Swedish vessel, of which the defendant below was captain, and plaintiff one of the crew, and that by a provision in the treaty between this country and the government of Sweden and Norway, the courts of this country have no jurisdiction in such cases; but that such claims are cognizable only before the consul of the country to which the vessel belongs. The clause of the treaty is as follows:

(178) "The consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels, belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crew, or of the captain, should disturb the orders or tranquility of the country; or the said consuls, vice-consuls, or commercial agents, should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment, or arbitration, shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

Notwithstanding this provision, the marine court gave judgment of $100 and costs for the seaman, and the question we are called upon to review is, whether this case does or does not come within the treaty.

We are of opinion that it does come within the treaty; it is of great importance to American masters of vessels in Sweden, that they should have the protection of this clause to prevent the interference of the courts of Sweden with their crews, and under this clause they have a right to claim that no one but the American consul there shall have any right to adjudicate such differences as may arise between them. Now, if our vessels in Sweden have this right there, of course we ought as fully to extend the same protection to Swedish captains here. In this case, the facts clearly appear that the seaman is a Swede by birth, and he is alleged to have deserted on a former voyage of this vessel in this port. When the vessel again came here, he voluntarily shipped again, and on her last return here, again left her without permission, and then instituted this suit for his wages, since his last shipment, the consul, at the same time, having caused proceedings to be instituted to have him arrested as a deserter. No case certainly could come more directly and fully within the treaty. It is contended by the counsel for the seaman, that the fact of his having the last time shipped in New York, takes the case out of the treaty, and that it applies only to the crew who originally shipped in Sweden. Such a con-

struction of it would be entirely too narrow; the custom of shipping sailors in foreign ports by vessels of all nations is general, and necessarily must exist; and persons who thus ship voluntarily, bring themselves under the government and jurisdiction of the country on board whose vessel they ship. A seaman has no right to appeal to the courts here, as long as he belong to a Swedish vessel.

The attention of the court is directed to a part of the justice's return, imputing fraud to the official acts of the consul in the manner of shipping the sailor. We see no grounds for imputing either fraud or improper motives to the consul's acts; all he did, appears to us clearly to be what his official duty required, and no more. And even if a foreign official should at any time fail in his duty, national courtesy should prompt the courts here, not to make them the subject of unnecessary comment.

Judgment reversed.

OCTAVIE, THE, (1863, Great Britain—Belgium)
33 L. J. P. M. A. N. S. 115.
Dr. Lushington, High Court of Admiralty.

(Syllabus) The protest by a foreign consul against the prosecution of a suit for wages against a ship of his country does not deprive the court of its jurisdiction, but makes the exercise of that jurisdiction discretionary.

ORNELAS v. RUIZ, (1895, U. S.)
161 U. S. 502.
Fuller, Supreme Court.

(Extract) The republic of Mexico applied for the extradition of these petitioners by complaints made under oath by its consul at San Antonio, Bexar county, Texas, under section 5270 of the revised statutes. The official character of this officer must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf. Wildenhus's case, 120 U. S. 1. As the construction of the treaty was drawn in question the appeal was taken directly to this court, and the district court rightly required petitioners, under rule 34, to enter into recognizance for their appearance to answer its judgment.

ONE HUNDRED AND NINETY-FOUR SHAWLS, (1848, U. S.—Great Britain)
1 Abb. Adm. 317; Fed. Cases 10,521.
Betts, District Court.

[Consul intervened to represent unknown owners.

Court decreed that in respect to the British consul, who inter-

vened officially in protection of the rights of absent and unknown owners, his taxable costs were to be paid before the order for delivering up the property was executed.—ED.]

(Extract) As the libellants may not reclaim the property attached in their behalf, the decree will make provision enabling the claimants who have intervened in their own rights and the British consul in behalf of unknown owners, to take the goods out of court and ship them to their port of destination.

ORR v. THE ACHSAH, (1849, U. S.)
Fed. Cases 10,586.
Kane, District Court.

[Suit *in rem* for wages after break up of voyage.—ED.]

(Syllabus) The protest of a foreign consul will not prevent the district court from taking jurisdiction of the case.

OSCANYAN v. ARMS COMPANY, (1880, U. S.)
103 U. S. 261.
Field, Supreme Court.

(272) (Extract) In the first place, the plaintiff was, at the time, an officer of the Turkish government. As its consul-general at the port of New York, he was invested with important functions, and entitled to many privileges by the law of nations. It is not necessary here to state with any particularity the functions and privileges attached to the consular office. These will be found in any of the approved treatises on international law.

It is enough to observe that a consul is an officer commissioned by his government for the protection of its interests and those of its citizens or subjects; and whilst he is sometimes allowed, in Christian countries, to engage in commercial pursuits, he is so far its public agent and commercial representative that he is precluded from undertaking any affairs or assuming any position in conflict with its interests or its policy. By some governments he is invested——in the absence of a minister or ambassador to represent them—with diplomatic powers, and, as between their citizens or subjects, may also exercise judicial functions. By all governments his representative character is recognized, and for that reason certain exemptions and privileges are granted to him. In the constitution of the United States, consuls are classed with ministers and ambassadors in the ennumeration of parties whose cases are subject to the original juris-

diction of the supreme court, and in the treaty with the Ottoman empire authority is given to it to appoint consuls in the United States.

[In this case Turkish consul general sought to recover a stipulated percentage for using his influence with his government to induce it to purchase certain goods.—ED.]

OTTERBOURG'S CASE, (1869, U. S.)
5 Ct. Cl. 430.
Peck, Court of Claims of United States.

[A statutory requirement, as to a prescribed oath preceding entry upon duties of consul and before latter shall be entitled to salary, must be complied with before officer duly authorized to take oaths. Oath before consul of an other state not valid.

Act of 18th August, 1856, consul cannot exercise diplomatic functions without authorization from president.—ED.]

PARSONS v. HUNTER, (1836, U. S.)
2 Sumn. 419; Fed. Cases 10,778.
Story, Circuit Court.

[Case against shipmaster for not depositing ships' papers with consul—discussion of the proceedure to be followed in bringing suit for this omission—contains nothing material to the understanding of the consular office.—ED.]

PATCH v. MARSHALL, (1853, U. S.)
1 Curt. 452; Fed. Cases 10,793.
Curtis, Circuit Court.

This was an appeal from a decree of the district court, (453) in a cause of personal damage. The case is stated in the opinion of the court.

CURTIS, J. The district court having made a decree in favor of the libellant, and awarded to him damages, in the sum of four hundred dollars, together with his costs, the respondent appealed to this court, and entered his appeal at the present term. Some days afterwards, the consul of her Britannic majesty at the port of Boston, filed a protest against the jurisdiction of this court, assigning for causes, in substance,—

1. That the brig Hope, on board which the libellant and respondent sailed, was a British vessel; and the respondent, her commander, a British subject.

2. That an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government.

This objection to the jurisdiction must be first disposed of. The facts upon which its validity depends are, that the brig Hope was a registered vessel of Great Britain, and the master a British subject; that the voyage in question was made for account of merchants domiciled in Boston, who hired the master on wages, and provisioned and manned the vessel; but whether under a charter-party, or by reason of their ownership of the brig, does not appear.

The voyage, described in the shipping articles, signed by the libellant, is from the port of Boston to St. Jago de Cuba, and back to a port in the United States. The voyage actually performed was terminated in Boston, in July last; and the crew, including the libellant, were then and there discharged. The libellant was born in the United (454) States, and is described in the articles as of Baltimore, in the state of Maryland. There is evidence tending to show, that the libellant was not aware the brig was not a vessel of the United States, until after she sailed from Boston. The family of the master has, for a considerable time, resided in the neighborhood of Boston; and it did not appear that he has any other domicile.

Upon these facts, I am of opinion this protest must be overruled.

It is not easy to perceive how it can be allowed, without impairing the rights of the respondent himself. It must be remembered that he is the appellant. The protest is, therefore, an objection against entertaining his appeal. But if not entertained, what is to be done? If the appeal should be dismissed, upon the ground that this court would not exercise its jurisdiction in the case, the decree of the district court would stand unreversed; and upon a certificate from this court, that the appeal had been so dismissed, the district court might find itself obliged to execute its decree; because the decision would not be that the district court had not jurisdiction, or under the circumstances did not properly exercise it, no objection thereto being there made; but only, that after a protest by the consul, this court would not entertain the appeal.

If, however, this difficulty were overcome, I should not see sufficient ground upon which I could decline to exercise jurisdiction. It is evident there must be a failure of justice, if I were to do so. The claim is *in personam*. The actual domicile of the master is here. The voyage was ended at this port. The libellant is a native of the United States, and here has his home. To require him to follow this master

over the world, until he can find him in (455) a British port, would practically deprive him of all remedy. I do not think any considerations of public convenience, or the comity extended by the courts of admiralty of one country to those of another, have any applicability to such a case. I do not consider it necessary to review the decisions in England and this country, on the subject of the exercise of the admiralty jurisdiction over foreigners. None of them apply to a case where the claim is for a personal tort, and the libellant is not a foreigner, and the respondent, though an alien, is domiciled here, and the voyage was begun and terminated in the United States.

It is true this court should not call in question a British consul, for his official acts respecting the crew of a British vessel in a foreign port. It is correctly stated in the protest, that he is responsible solely to his own government; or if to individuals, such responsibility grows out of the municipal laws of his country, which this court would not undertake to administer. But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen by imprisonment in a foreign jail, is not to be here investigated. That depends on other considerations, and is not distinguishable from any other wrong done by the master, of which this court should take or refuse jurisdiction according to the national character and domicile of the parties, and the place of termination of the voyage. The Courtney, Edw. 239; The Calypso, 2 Hag. 209; The Salacia, 2 Hag. 262; The Madonna, 1 Dods. 37; The Two Friends, 1 Rob. 271; The Johann Friederich, 1 Wm. Rob. 38; The Bee, Ware's R. 332; The Jerusalem, 2 Gal. R. 191.

(456) The protest, therefore, must be overruled.

The court then examined the evidence, and affirmed the decree of the district court.

Wheelock, for the appellant.

Sawyer, for the appellee.

Hillard, in support of the protest.

PATTERSON v. BARK EUDORA, (1903, U. S.—Great Britain)
190 U. S. 169, 23 Sup. Ct. Rep. 821.
Brewer, Supreme Court.

On a certificate from the United States circuit court of appeals for the third circuit presenting the question whether the provisions of the statute prohibiting advance payment of wages to seamen were applicable to seamen shipping in a port of the United States on a foreign vessel, and whether, if so applicable, the statute was valid. Answered in the affirmative.

Statement by Mr. Justice Brewer:

On December 21, 1898 (30 Stat. at L. 755, 763, chap. 28, U. S. Comp. Stat. 1901, pp. 3071, 3080), congress passed an act entitled "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce." The material portion thereof is found in § 24, which amends § 10 of chapter 121 of the laws of 1884, so as to read:

"Sec. 10. (*a*) That is shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as a seaman, or from any person on his behalf, any renumeration whatever for providing him with employment, he shall, for every such offense, be liable to a penalty of not more than one hundred dollars."

"(*f*) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation; provided that the treaties in force between the United States and foreign nations do not conflict."

The appellants were seamen on board the British bark Eudora, and filed this libel for wages in the district court of the United States for the Eastern District of Pennsylvania. By an agreed statement of facts it appears that on January 22, 1900, they shipped on board such bark to serve as seamen for and during a voyage from Portland, Maine, to Rio and other points, not to exceed twelve months, the final port of discharge to be in the United States or Canada, with pay at the rate of one shilling for forty-five days and twenty dollars per month thereafter. At the time of shipment twenty dollars was paid on account of each of them, and with their consent, to the shipping agent through whom they were employed. On the completion of the voyage, they, having performed their duties as seamen, demanded

wages for the full term of service, ignoring the payment made, at their instance, to the shipping agent. The advanced payment and contract of shipment were not contrary to, or prohibited by, the laws of Great Britain. It was contended, however, that they were prohibited by the act of congress, above quoted, and that such act was applicable. The district court entered a decree dismissing the libel. 110 Fed. 430. On appeal to the circuit courts of appeals for the third circuit, that court certified the following questions to this court:

"First. Is the act of congress of December 21, 1898, properly applicable to the contract in this case?

"Second. Under the agreed statement of facts above set forth, upon a libel filed by said seamen, after the completion of the voyage, against the British vessel, to recover wages which were not due to them under the terms of their contract or under the law of Great Britain, were the libellants entitled to a decree against the vessel?"

Mr. Joseph Hill Brinton for appellants.

Assistant Attorney General Beck for the United States.

Messrs. Horace L. Cheyney and John F. Lewis for appellee.

Mr. Justice Brewer delivered the opinion of the court:

Applying the ordinary rules of construction, it does not seem to us doubtful that the act of congress, if within its power, is applicable in this case. The act makes it unlawful to pay any seaman wages in advance, makes such payment a misdemeanor, and in terms provides that such payment shall not absolve the vessel or its master or owner for full payment of wages after the same shall have been actually earned. And further, it declares that the section making these provisions shall apply as well to foreign vessels as to vessels of the United States, provided that treaties in force between the United States and foreign nations do not conflict. It is true that the title of the act of 1898 is "an act to amend the laws relating to American seamen," but it has been held that the title is no part of a statute, and cannot be used to set at naught its obvious meaning. The extent to which it can be used is thus stated by Chief Justice Marshall in United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313:

"Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and, in such case, the title claims a degree of notice and will have its due share of consideration."

See also Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 188

33 L. ed. 302, 307, 10 Sup. Ct. Rep. 68; United States v. Oregon & C. R. Co. 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165; Price v. Forrest, 173 U. S. 410, 427, 43 L. ed. 749, 755, 19 Sup. Ct. Rep. 434; Endlich, interpretation of statutes, § § 58, 59. When, as here, the statute declares, in plain words, its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel.

But the main contention is that the statute is beyond the power of congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the 14th amendment to the federal constitution, and reference is made to Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, in which we said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose , to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Further, that even if the contract be one subject to restraint under the police power, that power is vested in the states, and not in the general government, and any restraint, if exercised at all, can only be exercised by the state in which the contract is entered into; that the only jurisdiction possessed by congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry with it the power of controlling contracts of employment by those engaged in such service, any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce; and, finally, that the validity of a contract is to be determined by the law of the place of performance, and not by that of the place of the contract; that the contract in this case was one entered into in the United States, to be performed on board a British vessel, which is undoubtedly British territory, and therefore its validity is to be determined by British law, and that, as conceded in the question, sustains its validity.

We are unable to yield our assent to this contention. That there

is, generally speaking, a liberty of contract which is protected by the 14th amendment, may be conceded; yet such liberty does not extend to all contracts. As said in Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 659, 15 Sup. Ct. Rep. 586, 588:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

And that the contract of a sailor for his services is subject to some restrictions was settled in Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, in which § § 4598 and 4599, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3115, 3116), in so far as they require seamen to carry out the contracts contained in their shipping articles, were held not to be in conflict with the 13th amendment, and in which a deprivation of personal liberty not warranted in respect to other employees was sustained as to sailors. We quote the following from the opinion (p 282, L. ed. p. 718, Sup. Ct. Rep. p. 329):

"From the earliest historical period, the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained —as Molloy forcibly expresses it—'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion or absence without leave during the life of the shipping articles."

If the necessities of the public justify the enforcement of a sailor's

contract by exceptional means, justice requires that the rights of the sailor be in like manner protected. The story of the wrongs done to sailors in the larger ports, not merely of this nation, but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control, and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard, and the ship at sea, the sailor is powerless and no relief is availing. It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. And, while in some cases it may operate harshly , no one can doubt that the best interests of seamen as a class are preserved by such legislation.

Neither de we think there is in it any trespass on the rights of the states. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the state. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state, and in an ocean voyage. Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of congress, which is charged with the duty of protecting foreign and interstate commerce.

Finally, while it has often been stated that the law of the place of performance determines the validity of a contract (London Assur. Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 160, 42 L. ed. 113, 120, 17 Sup. Ct. Rep. 785), yet that doctrine does not control this case. It may be remarked, in passing, that is does not appear that the contract of shipment or the advance payment were made on board the vessel . On the contrary, the stipulated fact is that the "seamen were engaged in the presence of the British vice-consul at the port of New York." The wrongful acts were, therefore, done on the territory and within the jurisdiction of the United States. It is undoubtedly true that, for some purposes, a foreign ship is to be treated as foreign territory. As said by Mr. Justice Blackburn, in Queen v. Anderson, L. R. 1 C. C. 161, "a ship which bears a nation's

flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country. In The Exchange v. M'Faddon, 7 Cranch. 116, 136, 146, 3 L. ed. 287, 293, 297, this court held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of our tribunals while within a port of the United States. In the opinion, by Chief Justice Marshall, it was said that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." And again, after holding it "to be a principle of public law that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted, by the consent of that power, from its jurisdiction," he added: "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals."

Again, in Wildenhus's case, 120 U. S. 1, sub nom. Mali v. Hudson County Common Jail Keeper, 30 L. ed. 565, 7 Sup. Ct. Rep. 385, in which the jurisdiction of a state court over one charged with murder, committed on board a foreign merchant vessel in a harbor of the state, was sustained, it was said by Mr. Chief Justice Waite (pp. 11, 12, L. ed. p. 567, Sup. Ct. Rep. p. 387):

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. * * * From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so, by comity, it came to be generally understood among

civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

It follows from these decisions that it is within the power of congress to prescribe the penal provisions of § 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals. In any case presented to them, they will be guided by their own views of the law and its scope and effect; but the courts of the United States are bound to accept this legislation, and enforce it whenever its provisions are violated. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign, as well as to domestic vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this. It is well said by counsel for the government in the brief which he was given leave to file:

"Moreover, as 90 per cent. of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seamen. To the average sailor it is a consideration while in port to have his wages in part prepaid; and if, in a large port like New York, 90 per cent of the vessels are permitted to prepay

such seamen as ship upon them, and the other 10 per cent, being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to congress and fully justified the provision herein contained."

We are of the opinion that it is within the power of congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation; and that our courts are bound to enforce those provisions in respect to foreign, equally with domestic, vessels.

The questions, therefore, certified by the court of appeals, will each be answered in the affirmative.

Mr. Justice Harlan concurred in the judgment.

PAUL REVERE, THE, (1882, U. S.)
10 Fed. Rep. 156.
Brown, District Court.

1. SEAMEN'S WAGES—EFFECT OF CONSUL'S DISCHARGE.

Where a consul has by statute jurisdiction to grant a discharge, his certificate thereof, duly authenticated, is a bar to a seaman's claim for wages subsequent to his discharge.

2. SAME.

Where, upon the proceedings before the consul on a charge of criminal misconduct, it does not appear that any question was made concerning the seaman's wages at the time of his discharge, the seaman is not precluded from claiming any wages which may, upon the merits, appear to be due to him.

3. SEAMAN—PUNISHMENT FOR MISCONDUCT.

Double punishment through loss of wages, in addition to confinement on board, is not to be imposed except in cases where the seaman is incorrigibly disobedient, and his confinement is necessary to the safety of the ship, in consequence of his own dangerous character.

4. SAME—DOUBLE PUNISHMENT WHEN NOT IMPOSED—CASE STATED.

Where the cook (colored) shipped for a voyage from New York to Yokohama and back, and when two months out, in an affray with the steward, fired two shots of a small pistol, by which the steward received a flesh wound in the wrist, and it appeared that the steward was a man of a quarrelsome and dangerous character; that the affray was the result of several previous quarrels and challenges to fight; and it appearing that aside from this affray the cook was neither quarrelsome nor dangerous in his ordinary behavior, and had previously applied to the captain for protection against the steward; and that immediately after firing he was arrested without resistance, put in irons by (157) the orders of the master, and kept in confinement during the following four months until after the arrival at Yokohama, and that his conduct during this time was good, and

permission to return to duty had been repeatedly sought from the captain by himself and others of the crew, held, that the cook was entitled to his wages up to the time of his discharge at Yokohama.

In admiralty. Action for seaman's wages.

This action was brought by the libellant (colored) to recover his wages as cook on board the ship Paul Revere, on her voyage from New York to Yokohama and back, from June 24 to September 24, 1879. On Sunday morning, September 1, 1878, about two months after the commencement of the voyage, an affray between the cook and the steward took place in the galley, in the course of which the cook fired two shots of a small pistol at the steward, by one of which the steward was wounded in the wrist. The libellant was immediately seized, put in irons, and kept so, for the most part, as the mate testified, until about a month before reaching Yokohama, when, being sick, the irons were removed from him, though he was still kept under restraint. The vessel arrived at Yokohama on December 24, 1878, and on the sixth of January the captain made a complaint in writing against the libellant before the consul of an assault with a deadly weapon. Upon the following day the libellant was brought before the consul, who, on the seventh, eighth and ninth of that month, examined the steward, the first and second officers, and the carpenter of the vessel. On the thirtieth of January he rendered a decision as follows:

"After careful consideration of the evidence in this matter, and in view of the fact that the weapon used by the accused is scarcely more than a toy, and that it would have been very difficult with it to have made a dangerous wound, and that it therefore hardly comes within the definition of a 'dangerous weapon,' and the accuser exhibiting himself as a man of irascible temper, and the evidence showing that the offence charged against the accused was the result of an altercation, one of many between the same parties, and that the accuser has been discharged the ship by consent of the master, the latter considering him a troublesome and violent man, and that the accused has now been a long time in confinement:

"I am of opinion that the offence charged is not of such a serious character as to warrant me in subjecting the government to the expense of transportation of the accused and that of the witnesses to the United Staes, and of his trial there, and I consider that he has been sufficiently punished already.

"It is therefore ordered that he discharged from arrest.

(Signed) "Thos. B. Van Buren, Consul General.

"Yokohama, January 31, 1879.

(158) "On being discharged from arrest, Jackson expressed an unwillingness to return on board ship and asked for his discharge, and the captain consenting, he was accordingly discharged, the ship paying into the consulate one month's extra wages.

(Signed) "Thos. B. Van Buren, Consul General.

"January 31, 1879."

The proceedings before the consul were duly certified and read upon the trial. The consul's certificate of the discharge of Jackson, "according to law ," on January 31, 1879, was also proved, together with the receipt by the consul of one month's extra wages.

Alexander & Ash, for libellant.

Henry Heath, for claimant.

BROWN, D. J. The consul at Yokohama had jurisdiction of proceedings to discharge the seaman upon his own application and with the master's consent. His certificate of such a discharge, duly proved and authenticated, is therefore conclusive, and bars any claim by the libellant to subsequent wages. Coffin v. Weld, 2 Low. 81; Lamb v. Briard, 5 Abb. Adm. 367; Tingle v. Tucker, Id. 919.

The proceedings before the consul do not show that any question was made before him concerning the wages which might be due to the libellant up to the time of his discharge, or that any inquiry or consideration was given to that subject. The libellant is, therefore, not precluded by those proceedings from claiming anything to which, upon the merits, he may be entitled. Hutchinson v. Coombs, 1 Ware, 65; The Nimrod, Id. 9.

The affray on the morning of September 1st was the result of repeated quarrels between the cook and the steward during the two months previous. The steward is shown to have been of a quarrelsome disposition, and he was discharged at Yokohama. According to the libellant's account of the affray upon the trial, after high words between them in the galley the steward had rushed out, and presently came back to the door of the galley with one hand in his pocket, holding the handle of a knife, recognized by the cook as having a long blade, and with violent language challenged him to come out and fight; that the cook asked him what he had in his pocket, and told him to go away; that the steward then rushed towards him; and that the libellant thereupon, believing his life in danger, standing in the doorway of his own room leading from the galley, fired at him twice with a pistol. The steward testified before the consul that the cook had first challenged him to fight, and that he had afterwards (159) come to the door of the galley and renewed the challenge; that the instrument in his hand was a can-opener and not a knife. When the mate and captain, upon hearing the pistol shots, immediately went to the galley, no resistance was made by the cook; but he said he was sorry he had not killed him. No complaint was made of the subsequent conduct of the cook, nor did he at any time show any evidences of an ugly disposition. Several times during his confinement he requested to be allowed to go on duty. Similar requests in his behalf were made by others of the crew, none of which were acceded to by

the captain. The pistol was not owned by Jackson, but had been given to him to be exchanged abroad for some foreign article. It was scarcely capable of inflicting a serious wound. The ball from it lodged in the steward's wrist, but inflicted only a flesh wound, which disabled his hand for two days only.

The captain was examined before the consul, and his deposition was also taken in this case. From these it does not appear that he ever instituted any inquiry into the particular causes of the affray, but he was familiar with the previous quarrelling between the cook and the steward, as he had shortly before, when appealed to by the cook for some protection against the steward, told him to get along as well as he could. From the violent character of the steward it is not certain that the cook did not have reasonable cause to believe himself in danger when the steward approached him from the galley door before he fired; but the fact that he had a pistol at hand, ready for use, and his language when arrested immediately after firing, show, not only that he was at the time in great passion, but also that his act was not merely an act of self-defense. The circumstances, while not sufficient to furnish a justification, do show much palliation in the degree of his offense. His long subsequent confinement by the master until the arrival at Yokohama was considered by the consul in his decision a sufficient punishment. In my judgment it was altogether more than was warranted at the hands of the master, having reference only to the character of the cook himself, and it may be that the confinement of the cook till arrival at Yokohama was quite as much an act of prudence and protection to him, in consequence of the quarrelsome and dangerous character of the steward, and the captain's belief that it was necessary to keep them apart. Aside from this consideration, the evidence does not show sufficient in the general behavior of the cook to warrant the prevention of his subsequent (160) return to duty, as he desired. To inflict upon him, under these circumstances, loss of wages also, would be imposing a double punishment.

In the case of Brower v. The Maiden, Gilp. 296, Hopkinson, J., says:

> "When seamen are confined on board for any misconduct or disobedience, has it ever been pretended that their wages stop, or are therefore forfeited during confinement? I know of no such case. Their imprisonment is their punishment, and forfeiture of wages has not been added to it." See, also, Bray v. The Ship Atlanta, Bee, 48; Wood v. The Nimrod, Gilp. 83, 89; Jay v. Almy, 1 Wood & M. 262; Thorn v. White, 1 Pet. Ad. 168, 175.

It is only where a mariner is incorrigibly disobedient, and his confinement, in consequence of his own dangerous character, is neces-

sary to the safety of the ship, that a forfeiture of wages has also been imposed. It would be not only unjust to the seaman, but highly impolitic and dangerous as a precedent, to permit the vessel to make a profit by the confinement of seamen on board except in cases of this description. The proofs in this case fall far short of that, and the libellant should, therefore, recover his wages up to January 31, 1879 at the rate of $30 per month, less $60 advanced to him, with costs.

PETERSON'S WILL, IN RE, (1906, U. S.—Denmark)
101 N. Y. Supp. 285; 51 Misc. 367.
Noble, Surrogate's Court, New York.

AMBASSADORS AND CONSULS—CONSULAR POWERS.

Under the treaty of April 26, 1826 (8 Stat. 342, art. 8), with the kingdom of Denmark, the Danish consul cannot appear for an infant party to a proceeding for the probate of a last will, so as to give the surrogate's court jurisdiction of such party, without the issuance of a citation.

In the matter of the probate of the last will of Valborg J. Peterson. Citation issued.

Abbott & Coyne, for proponent.

NOBLE, S. This is an application by a consul of the kingdom of Denmark to the United States of America, in the state of New York, for the probate of the last will and testament of a testatrix who, at the time of her death, was a subject of the kingdom of Denmark; the sole executor named in the will having died before the testatrix. The sole heirs at law and next of kin are the mother, brother, a sister, and a nephew of testatrix, all of whom reside in Copenhagen, Denmark, and are subjects of that kingdom.

Under the "most favored nation clause" in the treaty of April 26, 1826" (8 Stat. 342, art. 8), between the United States of America and the kingdom of Denmark, the Danish consul claims the right to represent the parties in interest in this proceeding and to waive the issuance and service of citation in their behalf. In the case of adult parties I do not question his right to appear to execute the necessary waivers and consents. However, Einer Bundgaard, nephew of the testatrix , is an infant over the age of 14 years. Under the laws of this state the only way in which a surrogate's court can obtain jurisdiction over the estate of an infant is by the issuance and service of a citation in the manner prescribed by the statutes.

In the case of personal property, in the treaty between the United States and the king of Italy, article 22 of the commercial treaty of 1871 (17 Stat. 856), provides:

"The citizens of each of the contracting parties shall have power to dispo

of their personal goods within the jurisdiction of the other by a sale, donation, testament or otherwise, and the representatives being citizens of the other party, shall succeed in their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are, shall be subject to pay in like cases."

Under that section the right of a consul to take possession, in behalf of subjects of their respective countries, of personal property, and to transmit it to such countries for distribution in accordance with the laws thereof, is unquestionable.

Again, under the "most favored nation clause," the treaty of 1853 between the Argentine Republic and the United States, provides as follows (10 Stat. 1009, art. 9):

(286) "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

Under this treaty the consul general, or, in his absence, the consul, is given the right "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

The provisions of these several treaties relate to personal property only, and the cases quoted in the brief of the learned counsel for the proponent herein, to wit, Matter of Tartaglio, 12 Misc. Rep. 245, 33 N. Y. Supp. 1121, Matter of Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119, Matter of Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040, Matter of Davenport, 43 Misc. Rep. 573, 89 N. Y. Supp. 537, as well as the Massachusetts case of in re Wyman, reported in 77 N. E. 379, are all administration cases, and therefore decide only the right of a foreign consul to take possession of a decedent's personal property under the provisions of the treaty with his country. I have found no case reported in which the right of a consul to waive the rights of an infant in a proceeding in a surrogate's or other court of this state is passed upon, and as it is not expressly covered by the treaty between the United States and the kingdom of Denmark, or any other country, the laws of the state of New York must govern. These laws do not admit of an infant waiving any of its rights, and, of course, no one else has any authority to do what the infant itself could not do. Under these circumstances the infant party in this pro-

ceeding must be brought under the jurisdiction of the court thr the medium of a citation properly issued and served.

Let citation issue accordingly.

PIONEER, THE, (1863, U. S.—Austria)
Blatchf. Prize Cases 666; Fed. Cases 11,175.
Nelson, Circuit Court.

[Trade of consul, merchant in enemy's country will not be tected from interruption by seizure and condemnation of his pro as enemy property.—ED.]

POOL v. WELSH, (1830, U. S.)
Fed. Cases 11,269.
Hopkinson, District Court.

[Payment of three months wages in case of discharge of se Right of consul to commission.—ED.]

POOLEY v. LUCO, (1896, U. S.)
72 Fed Rep. 561.
Wellborn, Circuit Court.

WELLBORN, District Judge. One of the defendants, Ju Luco, pleads to the jurisdiction of the court, and the question n be determined is as to the sufficiency of this plea. The suit is br by the complainant, a subject of Great Britain, against said and various other parties, alleged to be citizens of the United S to foreclose a mortgage executed by said Luco and others of t fendants, on certain real estate, situated in the county of San I in the Southern District of California. Said Luco denies that a citizen of the United States, and alleges that he is a citizen of and the duly-appointed and recognized consul-general of Chile f United States, residing in the city of San Francisco, state of fornia.

Jurisdiction, if it exists at all must rest upon one or more following grounds: First, diverse citizenship of the parties; s consular status of defendant Luco; third, location in this distr the *res,*—the mortgaged property. These grounds I will exam the order of their statement.

1. The question whether or not a circuit court has jurisd of a case, on the ground that both parties are aliens, has been a itatively and often decided in the negative. Montalet v. Mur Cranch, 46; Hodgson v. Bowerbank, 5 Cranch, 304; Prentiss v.

nan, Fed. Cas. No. 11, 385; Jackson v. Twentyman, 2 Pet. 136; Rateau v. Bernard, Fed. Cas. No. 11, 579; Hinckley v. Byrne, 1 Deady, 224, Fed Cas. No. 6, 510.

In this last case, Deady, J., used the following language:

"It has long since been settled that an action between aliens only cannot be maintained in the circuit court; that the language of the judiciary act giving jurisdiction where 'an alien is a party' must be restrained within the terms of the constitution, which only 'extends the judicial power' to an action between an alien and a citizen of a state of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case."

The controversy in the case at bar being between aliens, there is not such diverse citizenship as brings the case within the federal jurisdiction.

(562) 2. Has the court jurisdiction because of the consular status of the defendant? In his opening brief, plaintiff contends that "the circuit court of the United States has jurisdiction, concurrent with the district court, in cases affecting consuls;" citing Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407. I have examined the case cited carefully, and, so far from supporting, it seems to me antagonistic to complainant's contention. In that case the plaintiff was a citizen of New York, and the defendant consul, at the port of New York, for the kingdom of Norway and Sweden; but the latter's citizenship did not affirmatively appear, either in the pleadings er elsewhere in the record. The ruling of the court was to the effect that, inasmuch as the complainant was a citizen of New York, jurisdiction must depend upon the alienage of the defendant; and, further, that such alienage could not be inferred from the fact that the defendant held and exercised the office of consul of a foreign government, and, therefore, that the record "did not present a case which the circuit court had authority to determine." Since the consular character of the defendant was one of the prominent facts in the case, the decision necessarily holds that the fact of a defendant being a consul of a foreign government does not confer jurisdiction upon the circuit court. The opinion, however, declares that, where there is a controversy between a citizen and an alien, jurisdiction is not defeated by the fact that the alien happens to be the consul of a foreign government.

The other case cited by the plaintiff (Valarino v. Thomson, 7 N. Y. 576) seems to me to be also strongly against his contention. While the points there decided were: "A consul of a foreign government, residing in the United States, is not liable to be sued in the state courts.—The fact that the consul is impleaded with a citizen upon a joint contract will not give jurisdiction to the state courts,"—yet the

decision was based upon the ground that the district court of the United States had jurisdiction of the cause, exclusive of the state courts. Nowhere in the opinion is there even an intimation of jurisdiction in the circuit court.

In Lorway v. Lousada, 1 Lowell, 77, Fed. Cas. No. 8, 517, also cited by the plaintiff, the action was pending in the district court, and the decision was simply to the effect that that court, not the circuit court, had jurisdiction. The first paragraph of the syllabus is as follows:

"The district court has jurisdiction of a suit brought by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted."

The Havana, 1 Sprague, 402, Fed. Cas. No. 6, 226, another of plaintiff's citations, was a case also in the district court, and in admiralty. The discretionary power to hear and determine a cause, there asserted, rests upon a rule of law peculiar to admiralty, and confined to the district court.

In Lorway v. Lousada, supra, the rule is expressed thus:

"Courts of admiralty, it is true, exercise a considerable latitude of discretion in entertaining suits between strangers; and they are guided to some extent in the particular case by the nature of the controversy, whether it involves a question of general law or only the local law of the foreign country. This distinction, perhaps, arose out of the great diffidence with which courts (563) of admiralty in England were formerly accustomed to approach questions of local law, whether domestic or foreign. However this may be, it is now the better opinion, in this country at least, that where circumstances make it either necessary or highly convenient that the jurisdiction should be retained, as, for instance, when the voyage of a foreign vessel is broken up here, a court of admiralty will take the case, whether the law which it will be bound to administer happen to be local or general. In short, the question is one of discretion in the exercise of an admitted power, and not of the power itself. See, per Taney, C. J., Taylor v. Carryll, 20 How. 611; The Havana, 1 Sprague, 402, Fed. Cas. No. 6,226; The Wilhelm Frederick, 1 Hagg. Adm. 138; Patch v. Marshall, 1 Curt. 452, Fed. Cas. No. 10,793; The Jerusalem, 2 Gall. 191, Fed. Cas. No. 7,293; notes to 2 Pars. Mar. Law. bk, 3, c. 3. And the remark of Mr. Justice Curtis in Patch v. Marshall, 1 Curt. 455, Fed. Cas. No. 10,793, is to be understood, I have no doubt, in reference to a court of admiralty and its jurisdiction, which alone was involved in that case."

No case has been brought to my attention where it has been held, or even intimated, that the consular character of a party to the controversy gives jurisdiction to the circuit court. Nor do I believe that such a precedent can be found. There is no statutory provision conferring upon the circuit court jurisdiction on the ground indicated, while the jurisdiction seems to be granted, in terms, to the district courts. Rev. St. U. S. Sec. 563, subd. 18.

In Bors v. Preston, supra, the supreme court, at page 263, 111 U. S. and page 407, 4 Sup. Ct., says:

"But as this court and the district courts are the only courts of the Union which, under the constitution or the existing statutes, are invested with jurisdiction, without reference to the citizenship of the parties, of suits against consuls, or in which consuls are parties, and since the circuit court was without jurisdiction, unless the defendant is an alien or a citizen of some state other than New York, it remains to consider whether the records shows him to be either such citizen or an alien."

See, also, Lorway v. Lousada, supra.

Whether the state courts have concurrent jurisdiction with the district courts in suits against consuls since the repeal of paragraph 8 of section 711 of the revised statutes has not been definitely adjudicated. Froment v. Duclos, 30 Fed. 385. Plaintiff, in his concluding brief, suggests that although the supreme court, in Bors. v. Preston, has declared that subdivision 8 of section 711 of the revised statutes is repealed, "yet we find it to-day in the second edition of the revised statutes," etc. While it is true that the subdivision of the section in question is still found in the second edition of the revised statutes, yet it is printed in italics, thus denoting that the subdivision is repealed. See preface to second edition of the revised statutes. However, it is not necessary, in this case, to decide either upon the jurisdiction of the state courts or the federal district courts. Whatever may be the law with reference to these courts, I am clearly of opinion that the circuit court has not jurisdiction of a case because of the consular character of the defendant.

3. The remaining question is: Does the situation, in this district, of the mortgaged property, give jurisdiction to the circuit court? To my mind, clearly not. Mossman v. Higginson, 4 Dall. 11. In that case the suit was brought to foreclose a mortgage. (564) Complainant was a subject of Great Britain. The record did not disclose the citizenship of the defendants. The jurisdiction of the court was objected to, because of this latter fact. Complainant below urged that, since the suit was to foreclose a mortgage, the mere alienage of one of the parties was sufficient. To this it was replied by the defendants:

"The judiciary act was only intended to carry the constitution into effect, and cannot amplify or alter its provisions. The constitution nowhere gives jurisdiction (nor has any judge ever countenanced the idea) in suits between alien and alien. It is not an exception to the rule that the bill in equity is in the nature of a proceeding in *rem*, for there cannot be a foreclosure of the equity of redemption without a personal suit."

The second paragraph of the syllabus of the court is as follows:

"In proceedings in a federal court in equity to foreclosure, it is as necessary to describe the parties as in any other suit."

The opinion of the court was brief, and as follows:

"The decisions on this subject govern the present case; and the eleventh section of the judiciary act can and must receive a construction, consistent with the constitution. It says, it is true, in general terms, that the circuit court shall have cognizance of suits 'where an alien is a party'; but as the legislative power of conferring a jurisdiction on the federal courts is, in this respect, confined to suits between citizens and foreigners, we must so expound the terms of the law as to meet the case 'where, indeed, an alien is one party,' but a citizen is the other. Neither the constitution nor the act of congress regards, on this point, the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction."

It will be observed that the judiciary act of 1789, as stated by the court in the opinion last quoted, provided "that the circuit court shall have cognizance of suits 'where an alien is a party;' " yet, under that provision, the court, in view of the constitutional provision limiting jurisdiction to suits between citizens and foreigners, held that jurisdiction did not exist, except "where, indeed, an alien is one party, but a citizen is the other." The expression found in the judiciary act of 1789, "where an alien is a party," is omitted from the judiciary acts of 1875, 1887, and 1888, and the cases covered by said expression, as judicially construed, provided for in the words "or a controversy between citizens of a state and foreign states, citizens, or subjects." Section 8 of the judiciary act of March 3, 1875, referred to in complainant's brief and above cited, entitled "an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of cases from state courts, and for other purposes," providing for service upon absent defendants in suits to enforce liens, etc., does not purport to confer jurisdiction where it would not otherwise exist, but simply prescribes certain procedure in cases where jurisdiction does exist; or, more specifically, where a suit is within the jurisdiction of the court, and the object of the suit is to enforce a lien, etc., and some of the defendants are absent from the district within which the suit is brought, then the section is applicable, and simply provides a mode of service on such defendants.

(565) The case of Wheelwright v. Transportation Co. 50 Fed. 709, cited by complainant, does not conflict with this construction of said act, because in that case, which was brought in Louisiana, there was diverse citizenship, the plaintiff being a citizen of the state of New York, and the defendant a citizen of the state of New Jersey. While it is true the opinion speaks of said section 8 as conferring juris-

diction, yet is must be remembered that the question of jurisdiction, accurately speaking, was not before the court, because, admittedly, there was such diverse citizenship as gave jurisdiction. The real question was whether or not, admitting the parties to be citizens of different states, the defendants could be sued in a district other than that of his own or plaintiff's residence. This was a question, not of jurisdiction, but simply involving a matter of personal privilege of the defendant.

I am of the opinion that the plea of defendant Luco is sufficient in law, and the same will be allowed.

POPPING v. THE SIRIUS, see The Sirius.

POTTER v. OCEAN INS. CO., (1837, U. S.)
3 Sumn. 27; Fed. Cases 11, 335.
Story, Circuit Court.

(42) (Extract) In relation to the item for the survey at Tampico, there are three objections stated in the exceptions to its allowance. First, that the consul had no jurisdiction to order a survey; and that it should have been ordered by a maritime court. It is certainly the usual practice of courts of admiralty, and I deem it a very useful and beneficial practice, to order surveys in cases of this sort, as a matter of admiralty and maritime jurisdiction within their cognizance, and in my judgment, rightfully within their cognizance.[1]

But I am not aware, that it has ever been held to be indispensible to the validity of a survey, that it should eminate from such a source. The object of a survey is to assist the judgment of the master, as to his proceeding to repair damage, or to sell (43) the ship. It is designed to protect him in the fair discharge of his difficult and often critically responsible duty in great emergencies, by giving him the aid of the opinion of other men of sound judgment, intelligence, and skill in naval affairs. Indeed, this course is so universally adopted in practice, that a master, who should venture to deviate from it, would be treated as guilty of some improvidence, if not of gross rashness and neglect of duty. A survey is a common public document, looked to both underwriters and owners, as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the

[1] This jurisdiction seems incidentally affirmed in the case of Dorr v. Pacific Insurance Company, 7 Wheaton's R. 612, 613, and of Janney v. Columbian Insurance Company, 10 Wheaton's R. 411, 418. Among my own MSS. is a copy of a decree of the admiralty court at Boston, in 1745, before Judge Auchmuty, in which, upon petition of the masters to survey a vessel, (The Three Marys), she was condemned, and ordered to be sold as unseaworthy.

ship, and other property at hazard. In some policies, as for example, when what is technically called the "rotton clause" is inserted, such a document seems indispensable; as the survey may amount to a discharge of the underwriters.[1]

But although surveys are and may be thus ordered by courts of admiralty, I am not aware, as I have already said, that this is an indispensable requisite. On the contrary, a survey may be made upon the mere private application of the master directly to the surveyors; and there does not seem any good reason, why, if an American consul should interpose in behalf of the master, and with a view to assist him, should appoint the surveyors at his request, and thereby sanction their competency to the task, such an appointment should be deemed objectionable. As a known public officer, the act of a consul would, even if he had no express or implied authority to make the appointment *ex officio*, be deemed an act of higher authority, and more entitled to public confidence, than that of the master himself, and might be an inducement to the surveyors to undertake the duty with more promptitude and responsibility.

PRESIDENT, THE, (1804, Great Britain—U. S.)
5 Rob., C. 277.
Sir William Scott, High Court of Admiralty.

(279) (Extract) It has appeared, I think, in other cases, to be the disposition of the American government to confer the privileges of American navigation on vessels occupied by their consuls in foreign states. That government has, undoubtedly, a perfect right to grant such a privilege for the purposes of their own navigation; at the same time, that this country is also at liberty to apply, what we consider as the more correct principle of the law of nations, so far as third parties are concerned.

RABASSE, SUCCESSION OF, (1895, U. S.—France)
17 So. 867; 47 La. An. 1454; 49 Am. St. Rep. 433.
Miller, Supreme Court of Louisiana.

Appeal from district court, parish of Orleans; Thomas C. W. Ellis, judge.

In the matter of the succession of Eugene Rabasse. From a judgment dismissing the intervention of a delegate to represent certain French heirs, the intervener appeals. Reversed.

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[1] See cases on this clause—Door v. Pacific Insurance Company, 7 Wheaton's R. 582. Janney v. Columbian Insurance Company, 10 Wheaton's R. 411, 416 to 418. 1 Phillips' Insurance, 154, 158.

J. Numa Augustin, for delegate, etc., intervener, and third opponent, appellant. Theodule Buisson, Chretien, & Suthon, for attorney for absent heirs, appellees.

MILLER, J. The deceased, a resident of New Orleans, left heirs residing in France. Our treaty with that country provides, in case of death of any citizen of France in the United States without any testamentary executor by him appointed, the consul shall have the right to appear personally or by delegate in all proceedings on behalf of the absent or minor heirs. The stipulation is reciprocal, applying to estates of Americans dying in France. The French consul here appointed a delegate to represent the French heirs, and he applied for recognition to the civil district court in which the succession was being administered. That court denied the application, and appointed an attorney for the absent heirs. From the judgment dismissing the intervention of the appellant, claiming recognition as delegate, he prosecutes this appeal.

There is a motion to dismiss the appeal on the ground there is no pecuniary interest involved. There is involved a question of the construction and the execution of our treaty with France in respect to the interest of French heirs in a succession of over $100,000. The motion is denied. If the treaty is susceptible of the construction of the appellant, the result would be to avoid the appointment of the attorney for the absent heirs, and require the recognition of the appellant as the delegate of the French consul. In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented. Civ. Code, art. 1210; Robouam v. Robouam, 12 La. 73; Addison v. Bank, 15 La. 527. It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the rights of French subjects to be represented here by the consul of their country . On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, state and federal. Const. U. S. art. 6, par. 2; 1 Kent, Comm. 165; Ware v. Hylton, 3 Dall. 197; Prevost v. Greneaux, 19 How. 1; Hauenstein v. Lynham, 100 U. S. 483, 488; Geofroy v. Riggs, 133 U. S. 264, 266, 10 Sup. Ct. 295; Treaty with France, 1853 (10 Stat. 999), art. 12: Treaty with Belgium, 1882 (21 Stat. 99). The treaty discloses no purpose to require our courts to appoint as the attorney for absent

heirs the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court, as representing the absent heirs, and precluding the appointment of any attorney to represent them.

It is therefore ordered, adjudged, and de- (868) creed that the judgment of the lower court, dismissing the intervention of the delegate of the French consul, be avoided and reversed; and it is now ordered, adjudged, and decreed that said delegate be recognized as such delegate, authorized to represent the absent heirs in this succession, and that the succession pay the costs.

On Rehearing.

(June 29, 1895)

Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power. This view of the treaty to which our decision is confined, displaces the power of the lower court (exerted in ordinary cases) to appoint any attorney to represent the French heirs of this succession. The rehearing is refused.

REDMON v. SMITH, (1899, U. S.)
54 S. W. 636; 22 Tex. Civ. App. 323.
Neill, Court of Civil Appeals of Texas.

(Syllabus) The jurisdiction of actions by or against consuls, conferred on the federal courts by the federal constitution and by Rev. St. U. S. 1878 (2d Ed.) Sect. 563, 687, enacted in pursuance thereto, is not exclusive of the jurisdiction of the state courts, there being no express provision to that effect.

RELIANCE, THE, See One Hundred and Ninety-four Shawls.

RICE v. AMES, (1900, U. S.)
180 U. S. 371.
Brown, Supreme Court.

(Extract) We do not wish however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offence charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the government for that purpose, and Rev. Stat.

sec. 5271, makes special provision that "in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence, of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him.

RILEY v. THE OBELL MITCHELL, (1861, U. S.)
Fed. Cases 11,839.
Betts, District Court.

[Consul orders survey of ship—Consul acts in superintending sale of ship were exclusively official—rule in law and equity which inhibits a trustee, made such by operation of law, as much as one acting under special appointment, from acquiring an interest, applies in this case.—ED.]

ROBERT RITSON, THE, (1871, U. S.)
1 Low. 574; Fed. Cases 11,895.
Lowell, District Court.

[Case in which the court dismissed a libel where the consul filed a protest against the courts taking jurisdiction of the libel brought by seamen for wages.—ED.]

ROBERTS v. EDDINGTON, (1801, Great Britain)
4 Esp. 88.
Lord Kenyon, Nisi Prius.

This was an act on a charter party, by which the defendant chartered his ship to the plaintiff, engaged to go on a voyage from London to St. Petersburg, and bring home a cargo of deals on their account; dangers of the sea and restraints of princes only excepted, in the common form.

The ship had not proceeded to St. Petersburg.

The defence relied upon by the defendant's counsel, was, that the ship, in the course of her voyage, had met with storms and bad weather, which had forced her into Dantzic after she had passed the

Sound; and that, during her stay there, the Russian embargo had been laid on; so that, if the vessel had proceeded to Petersburg, the captain and crew must have gone into slavery.

The plaintiffs imputed the failure of the voyage to negligence and misconduct on the part of the defendant; and proposed to give in evidence what is termed the Sound list and the Petersburg list, which are documents transmitted by the British consul abroad at those different places to the merchants at home, which are publicly hung up at Batson's coffee-house, for the inspection of the public, and which state the arrival of the different ships at these places. By this evidence, the plaintiffs proposed to prove, that other ships which had sailed in the same fleet with the defendant's ship, and some even long after, had passed the Sound, and arrived safe at Petersburg, and had afterwards returned safely with a cargo.

LORD KENYON. These lists cannot be received in evidence; they are not bottomed in that, without which the facts which they are offered to prove cannot legally be established before a jury; namely, they are mere representations, and not upon oath; and are therefore inadmissible.

ROBSON v. THE HUNTRESS, (1851, U. S.)
2 Wall. Jr. 59.
Grier, Circuit Court.

(Extract) The right of a consul to intervene on behalf of citizens of his own country who are absent but interested, seems too well established in practice to be doubted. He cannot intervene for his sovereign when such sovereign has a minister or ambassador resident in the country. Regularly he should state for whom he intervenes, more fully than is set forth in this bill. But this defect may be remedied as suggested, and carried out by the final decree.

ROGERS v. AMADO, (1847, U. S.)
Newb. 400; Fed. Cases 12,005.
McCaleb, District Court.

[U. S. consul has no authority to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation.—ED.]

ROTH, IN RE, (1883, U. S.)
15 Fed. 506.
Brown, District Court.

(Extract) In the complaint presented to the commissioner in

this case the complainant makes oath that he is the consul of the Swiss confederation at this port, duly recognized as such by the president of the United States; and, in conclusion, the complainant, as such consular agent, and "in the name of the Swiss confederation, requests a warrant, etc., for the delivery of said Roth to the authorities of the Swiss confederation, in accordance with the terms of said treaty."

ROWE v. THE BRIG, (1818, U. S.—Spain)
1 Mas. 372; Fed. Cases 12,093.
Story, Circuit Court.

[Spanish consul at Boston intervenes in a matter of salvage and his action seems to be taken as a matter of course.]

(Extract) A claim was interposed by the Spanish consul for the property, as belonging to certain Spanish subjects unknown.

SACHEM, THE, See Hill v. The Sachem.

SAGORY v. WISSMAN, (1868, U. S.)
2 Ben. 240; Fed. Cases 12,217.
Blatchford, District Court.

[State courts have jurisdiction over suits brought by a consul.—ED.]

ST. JOHN v. CROEL, (1843, U. S.)
5 Hill 573.
Cowen, Supreme Court, New York.

By the court. COWEN, J. The learned judge thought the question in this case of so much importance as to call for a discussion in writing, with which I have been furnished. (a) I think he has shown that the proof of authority from F. and H. J. St. John was sufficient. I will only add, that if there can be any question whether the powers of attorney be within the 1 R. S., 747, 2d ed., sec. 4, sub. 3, and, therefore, the subject of acknowledgement before foreign consuls, the doubt is removed by 2 1d., 325, sec. 74, 2d ed.

Motion denied.

(a) The following is an extract from the opinion of Judge Gridley, and the only part of it which relates to the objections urged by the defendant's counsel on the appeal:

"It is not denied by the defendant's counsel that the revised statutes authorize the execution of deeds to be proved, etc., before consuls residing in foreign countries; 1 R. S., 747, 2d ed.; but it is insisted that the consular seal does not prove itself, except in certain cases specially provided for by act of congress.

See, act of cong. of 1792, ch. 24, and of 1803, ch. 62. In support of this position I am referred to Conk. Tr., 258, 259; 2 Cr., 184, 239; 1 Dowl. & R., 324; Story Confl. of L., 530; 3 East, 221; 17 Johns., 272; 1 Wend., 131; 2 Paige, 620, and Peterad. Abr., tit. Consul. I have no doubt that the general principle contended for by the defendant's counsel in relation to the necessity of proving consular seals, is correctly stated, and that, if it were not for the fact that the provisions of the revised statutes respecting the proof of deeds in foreign countries made this case an exception to the general rule, the objection would be fatal. 1 R. S., 747, 2d ed. But in construing this statute it should be borne in mind that the object of its enactment was to provide a convenient mode of proving the execution of deeds by grantors residing in foreign countries, and that the construction which dispenses with evidence of the official character of the person taking the proof and of the genuineness of the certificate, best comports with the design of the law makers. True, consuls are officers of the general government; but our statute adopts them as state officers for the particular purposes therein mentioned.

The 3d subdivision of the 4th section of the statute 1 R. S., 747, 2d ed. under which the powers in question were proved, was enacted in 1829, and clearly with the intent of increasing the facilities of proving deeds of real estate in foreign countries. The provision does not even require a seal; and it may be doubted whether it is at all subject to the 7th section of 1 R. S., 747, which requires a seal, and points out the mode of authenticating certificates. But when the 7th section was enacted, the 3d subdivision of the 4th section was not in existence; and it will be seen that it provides for a mode of authentication applicable to the cases embraced within it, by declaring that the acknowledgment or proof 'certified by them (the officers thereinbefore named) respectively, shall be as valid and effectual as if taken before one of the justices of the supreme court of this state.'

Jurats and certificates of acknowledgment are exceptions to the general rule requiring evidence of the official character and signature of the person before whom the deposition or instrument purports to have been sworn or acknowledged. The learned annotators upon Phillips' Evidence say: 'There are many cases in the law, not only of depositions, but also of acknowledgments and certificates, which are made proof *per se;* in all which cases the person officiating is regarded as a *quasi* officer of the court; and his act is recognized of course, like the return of a sheriff, etc. Courts take what is called judicial notice, that the person assuming to act has the proper authority.' Cowen & H. Notes to Phil. Ev., p. 628. At page 1247 of the same book it is laid down that 'where the officer taking the same (the acknowledgment or proof) styles himself such an officer as is authorized, that will be *prima facie* evidence of the fact of his being so.'

My conclusion is, that the proof of authority to commence the suit is now perfect as to all the plaintiffs, and that the order to stay proceedings should be revoked.''

ST. LUKE'S HOSPITAL v. BARCLAY, (1855, U. S.)
3 Blatchf. 259; Fed. Cases 12,241.
Betts, Circuit Court.

(265) (Extract) The defendants, being aliens, are amendable to the jurisdiction of the circuit court in a suit in favor of citizens,

and their consular character exempts them only from the jurisdiction of state courts. The act of congress gives to the district courts of the United States jurisdiction in civil actions, in suits against consuls, exclusively only of the state courts. By the law of nations, consuls are subject to the ordinary jurisdiction of the tribunals of the country to which they are accredited. (1 Kent's Comm., 43, 45; Wheat. Law of Nations, 293, § 22; 11 Wheat., 469, note). There seems, therefore, to be no legal impediment to the application of the eleventh section of the judiciary act of 1789 (1 U. S. Stat. at Large, 78) to actions by citizens against consuls, in the circuit courts of the United States.

On both points, in my opinion, this court has cognizance of this case, and the injunction prayed for ought to issue, and be enforced until the further order of the court.

Subsequently, Bunch pleaded to the jurisdiction of the court, that, at the commencement of the suit, he was the British consul at Charleston, S. C., and Barclay was the British consul at New York, both of them admitted by the president, and that they ought to be sued in the supreme court of the United States, or in some district court of the United States, and not elsewhere. After argument before Nelson and Betts, J. J., by Marshall S. Bidwell, for the plaintiffs, and Charles Edwards, for Bunch, the court (October 2d, 1855) overruled the plea, with costs.

SALOMONI, THE, (1886, U. S.—Italy)
29 Fed. Rep. 534.
Speer, District Court.

[Court declared that in the matter of wages Italian treaty of September 18, 1878, art. 11, gave the consul jurisdiction, but had the libel contained a prayer for the injury caused by the assault the court might have taken jurisdiction.—ED.]

SARTORI v. HAMILTON, (1832, U. S.)
1 Green 107; 13 N. J. Law 107.
Ford, Supreme Court, New Jersey.

(108) FORD, J. The plaintiff was accredited to the government of the United States as a foreign consul. Being sued in an action of debt in the court for trial of small causes, he plead to the jurisdiction of the justice, that he was suable only in the district court of the United States, according to the act of congress. The justice, however, tried the cause and rendered judgment against him as the maker of a promissory note.

If the act of congress be of any authority, it takes away the

jurisdiction of the justice, and of this court likewise, over a consul. Its words are these: "The district court of the United States, shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls." Acts of congress, 1 vol. 54, sec. 9. These words exclude state courts from civil jurisdiction over foreign consuls.

But the power to deprive a state of the right of administering justice to its citizens, is said not to be taken away by the constitution of the United States, and therefore no act of congress, can do it. The words of the constitution are, 3d art. sec. 2, "The judicial power of the United States shall extend to all cases affecting ambassadors and consuls." They may have concurrent jurisdiction, it is said; but the jurisdiction which state courts had, before the adoption of the constitution, not being taken away by express words, must, it is said, necessarily remain; for by the 10th amendment, "the powers not prohibited by the constitution to the states, are reserved to them;" and therefore that an act of congress prohibiting this jurisdiction to a state, is unconstitutional and void. But on the other hand, if state jurisdiction is excluded by a fair and necessary (109) implication of the words of the constitution, such implication is as good as express words. Now the exclusion seems to be fairly and necessarily implied. The constitution extends the judicial power of the United States to "ambassadors and consuls" both alike; it does not distinguish between them as to jurisdiction, but places them under one rule. If it had intended different rules for the two persons of ambassadors and consuls, it would have said so. If we disjoin and separate under two rules what are thus united under one and the same, we do arbitrary violence to the constitution. Now that the judicial power of the United States over ambassadors belongs to them exclusively, is not denied, and by the same rule, (there being but one rule) in the constitution, it must be exclusive over consuls also. One is made known by the other. Again, The 1st Art. 8th section empowers congress "to make all laws which shall be necessary and proper for carrying into execution the powers vested by the constitution in the government of the United States." One of them is the power of managing our public relations with the rest of the world without the interference of any state; another is, "to regulate commerce with foreign nations." For the exercise of these powers they are responsible to the nation and to foreign powers. Now a consul is a commercial agent, with public functions, accredited to the national government by a foreign power and is admitted to be under the particular protection of the law of nations. Mart. Lib. 4ch. 3, sec. 8. Therefore any maltreatment of the consul of a foreign power, is not only a justifiable cause of war, but has often occasioned wars in the

history of nations. No individual state is answerable for the treatment a foreign consul may receive; the national government is answerable alone; and it seems indispensably necessary to its responsibility, that it should have exclusive jurisdiction over them. How could it be answerable for laws affecting consuls, and for the execution of those laws over which it had no control? This reasonable and necessary implication in the constitution was adopted by the very first congress in the year 1789, so that its allowance was coeval with the government; it has been maintained under every administration, and impliedly assented to by every state in the Union for the last forty years. It has received the highest judicial sanction in a neighboring state, and (110) is approved by the most eminent of our American civilians. 1 Kent's Com. 44. But if state courts are ousted of jurisdiction, it is argued that we must dismiss this present *certiorari*, for want of power to take cognizance of the present matter. This is not a fair inference from the premises. We have no jurisdiction, nor has the justice any; and it is our duty to restrain inferior tribunals and keep them from exceeding their legal jurisdiction. We exercise no jurisdiction over consuls ourselves, nor suffer inferior tribunals to do it.

On account therefore of its being a fair and necessary implication in the constitution, adopted at the commencement of the government, and acquiesced in to the present time, I feel bound to say that the justice had no jurisdiction, and that the judgment must be reversed.

Judgment reversed.

SAUNDERS v. THE VICTORIA, (1854, U. S.)
Fed. Cases 12,377.
Per Curiam, District Court.

(Extract) The court having granted leave, Mr. Rush then read the following paper, signed by Mr. Mathew: "To the honorable John K. Kane, judge of the district court of the U. S., in and for the Eastern District of Pennsylvania. Saunders *et al.* vs. The British Brig 'Victoria' In Admiralty. In the above suit, instituted in this honorable court, by three of the crew of a British vessel, against said vessel and her master, on a claim for wages, the undersigned, her Britannic majesty's consul for Pennsylvania, residing at Philadelphia, begs leave respectfully, to enter this his dissent to the crew being permitted to sue in a court of the United States. First, Because the brig Victoria, on board of which the libellants and respondents sailed, is a British vessel, and the respondent, her commander, a British subject. Second. Because an investigation of the cause of suit, would call in question official acts and conduct of a British functionary in

regard to British subjects, which the undersigned has already disposed of to the best of his judgment; respecting which he is responsible only to his own government; and with regard to men, master and sailors, all residents at Nassau, where there is, as in all British colonies, an adequate court of appeal.

(Signed) GEORGE B. MATHEW, Consul.

Whereupon the court referred the consul to the cases of Weiberg v. The St. Oloff [Case No. 17,357], and the Golubchick, in 1 W. Rob. Adm. 143, as illustrating the law of the admiralty jurisdiction in cases of foreign vessels; but upon a view of the admissions contained in the libel, that the contract of shipment, if violated at all by the respondent, had been so violated at a time when recourse might have been had before a British tribunal, and that the parties are about to pass within a British jurisdiction again, and might therefore have recourse to the tribunals of their own country within a reasonable time, and without loss of proofs, concurred with her Britanic majesty's consul in the views expressed by him; and thereupon, made the following order: And now, 2d May, 1854, it appearing to the court, that the vessel is a British vessel, and the seamen British subjects, and that she is now about to sail to a British port, where redress may be had by the libellants, if entitled thereto; it is upon the dissent of the British consul to further proceedings being had in this court, said dissent being now filed, ordered that this libel be dismissed.

SAVAGE v. BIRCKHEAD, (1838, U. S.)
20 Pick. 172.
Shaw, Supreme Judicial Court of Massachusetts.

(Extract) The court are of opinion, that an American consul, residing in a foreign country, and who has been duly accredited there, is a magistrate, authorized to take affidavits and depositions in such foreign state or country, within the meaning of the rules of this court, directing commissioners to take depositions, and that the depositions taken in this case by Mr. Baker, the American consul, in the absence of the special commissioners, to whom it was first addressed, was duly and properly taken. Brancker v. Parker, in Suffolk, March term 1837.

SCANLAN v. WRIGHT, (1833, U. S.)
13 Pick. 523.
Shaw, Supreme Court of Massachusetts.

[Consul competent to take an acknowledgment of a deed of land. Derives his authority from both governments.
Is a magistrate.—ED.]

(528) (Extract) The next question is, whether this deed was rightly admitted to be registered in this country, it being objected that it was not acknowledged by the grantor, conformably to the statute. This statute requires that the deed be "acknowledged by the grantor, before a justice of peace in this state, or before a justice of peace or magistrate of some other of the United States, or in any other state or kingdom wherein the grantor or vendor may reside, at the time of making and executing the deed." This deed purports to have been acknowledged before D. Strobel, Esq., consul of the United States for the city of Bordeaux in France, Bishop Cheverus, the grantor, then residing at that place. The question is, whether an American consul is a magistrate, within the meaning of the statute.

It is difficult to fix any definite meaning to the word "magistrate," a generic term importing a public officer, exercising a public authority; it was intended, we think, to use a term sufficiently broad to indicate a class of officers, exercising an authority similar to that of justices of peace in our own state, or as nearly so as the difference in the forms of their governments and institutions would permit. It was to provide for the execution and acknowledgments of deeds, in all foreign countries. It may be remarked, as a circumstance of some consideration, that the acknowledgment is to be before some justice of peace or magistrate in any other state or kingdom, not of any other state.

There is nothing to indicate what kind of magistrate was intended, except the nature of the act to be done and the connection in which the term is used. The act is a ministerial one; it is to be before a justice of peace or magistrate. The maxim *noscitur a sociis* applies. It must then be a ministerial officer, exercising like powers with those of a justice of peace in this commonwealth, when acting in his ministerial capacity. Such an officer, we think, is a consul in a foreign country, at least in respect to the persons and interests of the country from which he is sent. An American consul in France, derives his authority, in effect, from both governments; he has his commission from the United States, but his *exequatur* from France; and it is, in truth, in virtue of (529) the authority vested in him by the latter, that he exercises any official authority within the territorial limits of the latter. The Bello Corrunes, 6 Wheat. 156, note; 1 Chitty's Com. Law, 48.

This view is somewhat confirmed by the statute law of the United States; Act of Congr. 1792, c. 24, sect. 2; which provides, that consuls shall have right in the posts or places to which they are appointed, of receiving the protests and declarations which masters, &c., who are citizens of the United States, may choose to make there, and

also such as any foreigner may choose to make before them, relative to the personal interest of any citizens of the United States. The same statute, sect. 9, provides, that the specific enumeration of powers therein expressed, shall not be deemed to exclude such others as result from the nature of the office. An officer, authorized by the concurrence of both governments to exercise such powers in France, is, we think, a magistrate competent to take in France, and authenticate by his official act, the declaration of the grantor of a deed, that he has executed the same freely, as his act and deed, and that such acknowledgment so authenticated is sufficient to warrant the register of deeds in this commonwealth to record it.

SCHUMIOR v. RUSSELL, (1892, U. S.)
83 Texas 83.
Gaines, Texas Supreme Court.

(88) (Extract) The depositions in this case sought to be suppressed were taken in the city of Camargo by an officer who gave his official title as "consular agent of the United States at Camargo, Mexico." In authentication of his act he used a seal, which contained the words, "United States Commercial Agency." It is claimed that the seal of the United States commercial agency is not the seal of this officer. Section 1674 of the revised statutes of the United States contains this language:

"1. 'Consul-general,' 'consul,' and 'commercial agent' shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes.

"2. 'Deputy consul' and 'consular agent' shall be deemed to denote consular officers subordinate to their principals, exercising powers and performing duties within the limits of their consulates or commercial agencies respectively, the former at the same ports or places, and the latter at points and places different from those at which such principals are located respectively.

"3. 'Vice-consuls' and 'vice-commercial agents' shall be deemed to denote consular officers who shall be substituted temporarily to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty.

"4. 'Consular officer' shall be deemed to include consul-general, consuls, commercial agents, vice-consuls, vice-commercial agents, and none others."

A consul is defined to be, "a commercial agent of a country residing in a foreign seaport, whose duty it is to support commercial intercourse of the state, and especially of the individual citizens." 3 Am. and Eng. Encyc. of Law, 764. From this definition, as well

as the language of the statute, we deduce these conclusions: That a consul and a commercial agent are invested with the same powers and duties; that though nominally different, the office of each is substantially the same as that of the other, and that the name is determined by the relative (89) importance of the port to which the officer is assigned. It is to be noted that the second subdivision of the section of the revised statutes of the United States hereinbefore quoted provides, that deputy consuls are subordinates who perform their duties at the same port as their principals, and that consular agents are in effect deputies who act at a place other than that at which their principals are located. In the first subdivision commercial agents are declared to be principal officers, and it is thereby indicated that they might have deputies. It would seem that if a commercial agent should be placed in charge of a number of ports or places, a deputy might be necessary at places where he could not discharge the duties of the office in person. But the revised statutes do not expressly mention a deputy commercial agent or the agent of that officer. The agent of a commercial agent by being called a commercial agent would not have been distinguished from his principal, and we therefore incline to the opinion that it was intended that such a deputy when acting at a place different from that of his principal was intended to be known as a consular agent. He is such in fact, and it is no misnomer. It is evident from the certificate to the depositions in this case that the officer was an agent in a commercial agency, and we infer that, under the official title of consular agent, he was acting as deputy of the commercial agent of a consular district. The seal of the United States commercial agency would indicate that such agency existed at Camargo, and it would seem that a consular agent at that point must have been subordinate to the commercial agent in charge of the district in which Camargo was situate. But at all events, it is to be presumed that the officer who took the deposition did his duty and affixed the proper seal in authentication of his acts; and from the lights before us we can not say that the seeming discrepancy between the seal and the title of the officer is sufficient to overcome that presumption. On the contrary, without the aid of the presumption, we are inclined to the opinion that we should be constrained to hold that the seal was a proper one.

SCOTT v. HOBE, (1900, U. S.)
108 Wis. 239; 84 N. W. 181.
Winslow, Supreme Court of Wisconsin.

(241) WINSLOW, J. (Extract) It is insisted by the appellant that the state courts have no jurisdiction of this action, because the

defendant is a vice consul of Sweden and Norway and can only be sued in the courts of the United States. The defendant was a trading consul, the action here brought is one which arises out of his business, and the principle of international law is that a trading consul is liable to the ordinary processes of (242) law in all that concerns his trade, in the same way as a native merchant. Coppell v. Hall, 7 Wall. 542. The defendant is therefore amenable to the jurisdiction of the state courts, unless that jurisdiction has been taken away by the constitution and laws of the United States,—for the state courts have jurisdiction unless it has been taken away; the United States courts have no jurisdiction unless it has been given. By the constitution of the United States, the courts of the United States were vested with judicial power extending to "all cases affecting ambassadors, other public ministers, and consuls," and in all such cases the supreme court was given "original jurisdiction." Const. U. S. art. III, sec. 2. A grant of original jurisdiction is not a grant of exclusive jurisdiction; hence there is nothing in the constitutional clauses just cited which deprives the state courts of jurisdiction. Bors v. Preston, III U. S, 252. By the judiciary act of 1789, however (R. S. of U. S. 1874, sec. 711, par. 8), exclusive jurisdiction was vested in the courts of the United States over "all suits or proceedings against ambassadors or other public ministers,... or against consuls or vice consuls." Under this act it was well settled that the jurisdiction of the United States courts was exclusive. Davis v. Packard, 7 Pet. 281; Valarino v. Thompson, 7 N. Y. 576. This paragraph was repealed by ch. 80 of the United States statutes at Large, passed by the 43d congress, approved February 18, 1875, so that there is now no constitutional or statutory provision vesting exclusive jurisdiction of such causes in the United States courts. In the absence of such provision, or of any treaty provision, the jurisdiction of the state courts seems unquestionable. The same result was reached in Wilcox v. Luco, 118 Cal. 639, 45 L. R. A. 579; and De Give v. Grand Rapids F. Co. 94 Ga. 605.

SEIDEL v. PESCHKAW, (1859, U. S.)
27 N. J. Law. 427; 3 Dutch. 427.
Haines, Supreme Court of New Jersey.

(429) HAINES, J. (Extract) Another objection to the affidavit of Peschkaw is, that it was not made before a person having competent authority to administer such an oath.

It purports to have been made at the city of Vienna, in the empire of Austria, before Edward C. Stiles, the consul of the United States at that place, tested by the signature and the consulate seal.

The objection is, that a consul of the United States has no authority to administer an oath.

The act of 10th March, 1853, (Nix. Dig. 132, pl. 57,) authorizes the administration of an oath or affirmation to hold to bail, by "any ambassador, public minister, charge of affairs, or other representative of the United States, for the time being, at any foreign court or government.

The question presented is, whether a consul of the United States at a foreign court or government is a representative of the United States.

A consul is a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state. By virtue of his office, he is clothed only with authority for commercial purposes. He is not to be considered as a minister or diplomatic agent of his government, intrusted with authority to represent it in negotiations with foreign states or to vindicate its prerogatives. 1 Kent's Com. 43; 3 Wheaton 445, *In re* The Annie.

(430) He has not the immunities of an ambassador, but in civil and in criminal cases is subject to the local laws, in the same manner as other foreign residents owing temporary allegiance to the state to which he is accredited.

But consuls are agents of their governments; and in the United States, it belongs exclusively to the president, by and with the advice and consent of the senate, to appoint consular officers to such places as he and they may deem to be meet. They are officers created by the constitution and law of nations, and not by act of congress. 7 Opinion on the Constitution 242.

The persons so appointed are responsible for their official deportment to the United States, and are required to enter into bonds, with sureties for the faithful discharge of their duties. For any neglect or malfeasance in office they are liable to indictment for the offence, and also, upon their official bonds, for all damages caused thereby, to be sued for in the name of the United States, to the use of the persons injured.

Their compensation is by salary, paid by the United States, or by fees, according to the rates established by act of congress.

A consul must be recognized by the government to which he is sent, and authorized to exercise his official functions within its territory. His *exequatur*, granting such authority, may be withdrawn, and his functions suspended at the pleasure of the executive of that government. He is not, in general, responsible personally for contracts made in his official capacity on account of the government he represents. Jones v. Le Tombe, 3 Dallas 384.

In his official acts, he represents the United States.

On the arrival of a vessel from the United States at his port, the commander is required to deposit with the consul his sea letter and register, under a penalty of $500, and they are to be returned to him only on his producing to the consul his clearance from the proper officer of the (431) port, and on compliance with the provisions of the acts regulating the conduct of such officers in foreign ports. Act of Congress, 28th February, 1803; Harrison v. Vose, 9 Howard 372.

He is to protect the seamen of the United States discharged in a foreign port, and receive from the master three months' wages, besides the wages due at the time of their discharge, to provide for the return home of such as desire to return, and for the support of such as may be destitute.

He is to hear complaints of seamen against the master. He is to reclaim deserters, and to inquire into the seaworthiness of ships. He is to take measures for the preservation of stranded vessels of the United States and their cargoes. He is to take possession of the personal effects of such citizens of the United States as shall die within his consulate unrepresented, and to administer the same by paying the local debts, and remitting the residue to the United States treasury. All these, and other official acts, are performed, as the officer of the United States, for the protection of the persons and property of the citizens of the United States. In them all, he represents the government by which he is invested with authority to perform them. He is the instrument through whom the United States extends protection to such of its citizens; and as an emblem of his authority, and of so much of the sovereignty of his government, he is permitted to raise its national flag over his consulate residence.

If, then, he is appointed and paid by the United States—is responsible to that government for his official conduct; if he is recognized by the government to which he is sent as the officer of the United States; if he acts on behalf of the United States; and his official acts relate only to the persons and property of citizens of the United States, he must be regarded as a representative of the United States within the meaning of our statute, and so have (432) authority to administer an oath to be used in the courts of this state. We must therefore conclude that a consul has authority to administer an oath, and that the objections to the formality of the affidavits are not sustained.

SEMMENS v. WALTERS, (1882, U. S.)
55 Wis. 675; 13 N. W. 889.
Orton, Supreme Court of Wisconsin.

(681) ORTON, J. (Extract) 1. The depositions were returned to

the commissioner in Canada for correction by signing his name as a commissioner instead of consul of the United States. This was not error. 2 Wait, Pr. 707; Keeler v. Vanderpool, 1 Code R. (N. S.) 289; Creamer v. Jackson, 4 Abb. 413. It is suggested, but not decided, the statute authorizing commissions, contemplates their issue to unofficial persons not otherwise authorized to take depositions, and the issue of commissions only to persons in another state or territory of the Union. Consuls of the United States are authorized to take depositions without a commission, and a commission is needless. 2 Rev. St. U. S. (2 Ed.) § 1750; Herman v. Herman, 4 Wash. C. C. 555. And it is questionable whether the strict rules of taking depositions by commissioners ought to be applied in such a case, where the proper notice, as in this case, was given of the examination of certain witnesses whose residence is given in the notice before a consul of the United States in one of the provinces of Canada, and the time and place are also given in the notice.

SHARPE AND SHARPE v. CRISPIN, (1869, Great Britain)
1 L. R. P. & D. 611; 20 L. T. 41.
Wilde, Courts of Probate and Divorce.

(Syllabus) The mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country. But, if one already domiciled and resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicile.

SHOREY v. RENNELL, (1858, U. S.)
1 Sprague 416.
Sprague, District Court.

[Imprisonment of seamen by consul condemned. The master of vessel had unfair advantage in laying his complaint before consul, who should have been "extending to the seamen that protection which they had a right to demand from his official character."—Ed.]

SIDY HAMET BENOMOR BEGGIA, (Case of), (1822, Great Britain)
1 Add. 340.

[Case where consul appointed by emperor of Morroco to receive estate of deceased consul leaving no heirs petitioned to be appointed administrator.—Ed.]

SIMPSON v. FOGO, (1862, Great Britain—U. S.)
1 H. & M. 195; 29 L. J., ch. 657.
Wood, Vice Chancellor, High Court of Chancery.

[Consul intervened in suit with authority from absent subject. Seems to raise no question affecting consuls.—Ed.]

SIRIUS, THE, (1891, U. S.—Great Britain)
47 Fed. Rep. 825.
Ross, District Court.

[British consul asked court to take jurisdiction in a suit for wages and breach of contract—court accordingly took jurisdiction.—ED.]

SMITH v. TREAT, (1845, U. S.)
Fed. Cases 13,117; 4 N. Y. Leg. Obs. 13.
Ware, District Court.

[Consul sent home in irons mate who killed sailor.—ED.]

SNOW v. WOPE, (1855 U. S.)
Fed. Cases 13,149.
Curtis, Circuit Court.

(Extract) The consul of the United States for that port was absent. His clerk came on board and saw the libellant, and told him he was not entitled to his discharge, and appears to have aided the master to procure the interposition of the local authorities. If this had been done by the consul, under the powers conferred on him by the act of congress of July 20, 1840, and there was no illegality in the conduct of the master in applying to him for his action in the matter, then, as was held by this court in Jordan v. Williams, the master would not have been liable for such imprisonment. But no one but a duly appointed consul or commercial agent of the United States, is intrusted by the act of congress, with the power to employ the local authorities to check insubordination.

SORENSEN v. THE QUEEN, (1857, Great Britain)
11 M. P. C. C. 119.
Sir John Patteson, Privy Council.

See The Baltica 1 Spink's Prize Cases 264.

SPANISH CONSUL'S PETITION, (1867, U. S.—Spain)
1 Ben. 225.
Blatchford, District Court.

Foreign commission.

BLATCHFORD, J. The petitioner, who is the consul of her majesty the queen of Spain at the port of New York, represents that he has received from the judge of the Southern District of Santiago, in the island of Cuba, a commission, empowering him to take the testi-

mony of certain witnesses named therein, to be used in a criminal prosecution for swindling, a translation of which commission he produces, and he prays that a summons may be issued by me requiring the witnesses to attend and testify. I have no power to issue the summons asked for. The only provisions made by congress, on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are those found in the act of March 2d, 1855 (10 U. S. Stat. at Large, 630, sect. 2), and in the act of March 3d, 1863 (12 Id. 769). The former provides that "where letters rogatory shall have been addressed from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioners shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court." The latter act is confined to the taking of testimony to be used in a suit for the recovery of money or property depending in a court of a country with which the United States are at peace, and in which the government of such foreign country is a party or has an interest.

The prayer of the petition is denied.

STAHEL v. UNITED STATES, (1891, U. S.)
26 Ct. Cl. 193.
Davis, Court of Claims of the United States.

(195) DAVIS, J., delivered the opinion of the court:

Section 1745 of the revised statutes authorizes the president to prescribe the "rates or tariff of fees to be charged for official services and to designate what shall be regarded as official services, besides such as are expressly declared by law." Pursuant to this authority the president has published a volume entitled "Consular Regulations," containing the regulations and instructions, including a tariff of fees to be charged for official services, for the information and government of con-(196)sular officers of the United States. The regulations of 1881 were in force during the entire period covered by this action.

As to the authority conferred by section 1745 (Rev. Stat.) the supreme court said:

"This section concerns itself wholly with "official services." The tariffs of fees to be prescribed by the president from time to time are those to be charged for "official services." The president is to designate what are to be regarded as "official services" in addition to such as are expressly declared by law." (Mosby v. The United States, 133 U. S. R., 273.)

Section 180 of the consular regulations (1881) provides as follows:

"These provisions respecting tonnage and other fees and the deposit of a ship's papers apply to American or foreign built vessels purchased abroad and wholly owned by citizens of the United States, in the same manner as to regularly documented vessels."

While plaintiff was consul-general at Shanghai, China, he performed services for vessels of this description, and there were paid into his office "tonnage dues" and fees for "report to customs," for "oath and appointment of master," and for "bill of health," which he turned into the treasury, and now claims were his personal emolument.

On behalf of plaintiff it is contended that the vessels to which the consular services were rendered were not ships or vessels of the United States; that, while entitled to government protection as property of citizens of the United States, they were under no legal obligation to obtain and pay for the services of consuls at foreign ports; that having done so, the fees paid therefor were "unofficial," not "official" fees, as the consul acted unofficially, and not under warrant of law; that is, his services were personal.

Before considering this proposition it should be noted that the question before us is not primarily whether vessels of this class are obliged to pay fees of the kind complained of, but whether, when paid, the president can classify these fees as official fees or must regard them as unofficial fees.

The money has in fact been paid; the consular regulations, in fact, affix to it an official character, and it is now in the national treasury. (197)

Whether the shipowner was under legal obligation to pay these fees is one question; whether, when paid, the consul may retain them as fees for unofficial services is another question.

The power of the president under section 1745 of the revised statutes is very broad, and authorizes him to prescribe the rates of fees to be charged for official services, to designate what shall be regarded as official services, "besides such as are expressly declared by law," and to adapt the rates or tariffs of fees to the different consulates. There seem to be but two limitations upon his power—one (expressed) which prevents him from declaring a fee to be unofficial which the law declares official; and one (implied) which prevents him from prescribing a fee for a service which the law declares shall be rendered gratuitously.

It may or may not be that the president had not the power to force the shipowner to pay these fees; as to this, of course we express

no opinion; but if he had not the power and the fees were illegally collected, we still fail to see how the consul can base upon this fact a claim to retain, as a personal emolument, the money so illegally collected. The president has directed the collection of fees of this class and has marked them with an official stamp; if the fee is illegally collected, the owner may perhaps have a right of recovery against the government, which directed their collection, but the subordinate officer who performed the services and collected the fees under the distinct order of the president, which at the same time classified the services and the fees as official, can not lay claim to the money thus coming into his hands.

Subject to the limitations we have suggested the president may at any time transfer a fee from the unofficial to the official schedule or *vice versa;* or he may increase, diminish, or abolish a fee, and his directions in this regard are binding upon the officers of the consular service. In the words of the supreme court, speaking by Mr. Justice Blatchford:

"The president is to designate what are to be regarded as 'official services' in addition to such as are expressly declared by law (supra)."

These items are therefore not allowed, and judgment will be entered in favor of plaintiff for the other items of his claim which are within the decision in Mosby's Case. Judgment for plaintiff in the sum of $5,190.21.

STATE v. DE LA FORET, (1820, U. S.)
2 Nott. & McC. 217.
Huger, Constitutional Court of South Carolina.

An ambassador or public minister of a foreign prince or state, is not amenable to the laws of the nation to which he is sent.—(a.)

The law of nations does not exempt a foreign consul from liability to the laws of the state in which he resides.—(b.)

The federal courts have not exclusive jurisdiction with regard to offenses committed by foreign consuls in the United States; but the consul is amenable to the laws of the state in which he commits an offence.

The defendant was indicted in the circuit court of Charleston, in January term, 1816, for an assault and battery.

A plea to the jurisdiction of the court, was interposed on the ground that he was the French consul, and therefore not amenable to the laws of the state.

The plea was sustained by the presiding judge, and now a motion was made to reverse that decision.

MR. JUSTICE HUGER delivered the opinion of the court.

Two grounds have been taken in support of the plea:

1st, That a foreign consul, by the law of nations, is (218) not subject to the laws of the state in which he resides—And

2d. That if he be subject to the laws of the country in which he resides, the federal courts have exclusive jurisdiction under the constitution of the United States, over all cases in which he is concerned.

I shall examine these grounds in their order.

That an ambassador, or public minister of a foreign prince or state, is not amenable to the laws of the nation to which he is sent, is, I believe, universally admitted. All the writers on the law of nations concur in opinion as to the existence as well as the propriety of this immunity: And no court in this country, either federal or state, is known to have questioned its existence.

In England, as early as the 7th of Ann, a statute was passed, "exempting ambassadors and public ministers from the process of their courts, and the statute declares all such persons as should prosecute any writ or process against them, to be violators of the law of nations;" and congress, in 1790, passed an act of similar import; but neither of these acts extends to consuls.

The privileges of ambassadors and public ministers are great, but they appear to be necessary. They are the representatives of nations, employed in the transaction of the most important concerns, the proper management of which requires the most perfect exemption from all possible influence or control. But a consul appears to be neither ambassador nor public minister. He is not the representative of his nation, nor is he employed in the management of national concerns. He is no more than a commercial agent, attending to individual interests. Vattel, (in B. 2, C. 2, S. 34,) speaking of consuls, declares, "that they are not public ministers, and cannot pretend to the privileges of one." Barbeyrac, Binkershoeck and Martens declare them subject to the laws of the country in which they reside. But Vattel appears to think that as a consul holds the commission of his sovereign, he ought to be regarded as more under the law of nations than a common (219) stranger. He goes so far as to say, that a consul's functions seem to require "that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the law of nations, by some enormous misdemeanor." It is a mere suggestion, at variance with the opinions of all other writers on the subject; and with which he does not appear to be entirely satisfied himself. In B. 4. C. 6., Sec. 75, he proceeds, "we have spoken of consuls in the article of commerce,

Formerly agents were a kind of public ministers; but in the present increase and profusion of titles, this is given to mere commissioners appointed by princes for their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the law of nations." He here classes consuls with agents, to whom he denies the protection of the law of nations. In the case of Viveash vs. Beckrer, (3 Maule and Selwyn, 284,) Lord Ellenborough concludes a very full investigation of this question, with the opinion, that no such privilege exists. And the chief justice of Pennsylvania, in the case of Kosloff declares, "that he cannot hesitate in the opinion that there is nothing in the law of nations which protects a consul general from indictment." We have indeed in the case of the United States vs. Mr. Ravara, consul from Genoa, the opinion of the then chief justice of the United States, Mr. Jay, whose diplomatic services and great learning entitle his opinion on this subject to great respect, "that consuls are not protected by the law of nations from the jurisdiction of the laws of place where they reside." (2 Dal. 297.) I am therefore of opinion that the plea cannot be sustained on the first ground.

The second ground presents great difficulties: The complex nature of our government, the union of several sovereignties under one, and yet each preserving a large proportion of independent sovereignty in itself; its recent establishment, which necessarily implies the absence of much experience, that will, in the progress of events, explain the meaning of its different parts, and reconcile them in one harmonious whole, must frequently originate questions of great nicety. In the consideration of such questions, much caution ought to be observed. The great purposes for which our governments were established, must be constantly kept in view; and no narrow rules of construction be adopted, which shall check in their growth the protecting powers of the federal government.

To the state governments, is committed the protection of all our domestic rights, on which depends almost the whole of private happiness. Here we have a field sufficiently ample to exhaust the powers of those, whose ambition it is to extend the bounds of human happiness; where the greatest talents, and most exalted feelings may be indulged without the fear of wanting employment.

On the federal government is devolved the duty of national protection. To enable it to perform this duty, all the means of national defence are given; the army, the navy, the militia, the power of taxation, the power of borrowing money, the power of defining and punishing piracies and felonies committed on the high seas, and offences

against the law of nations, to declare war, &c. But protection is not the only duty devolved on the federal government, by the constitution of the United States. It has power to regulate commerce; to establish an uniform rule of nationalization, and uniform rules on the subject of bankruptcies. It has power to coin money, &c. to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish post-offices and post roads; to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive rights to their respective writings and discoveries; to constitute tribunals inferior to the supreme court; to exercise exclusive legislation over such district as may be ceded to them. Here are powers, the exercise of which are necessary to national convenience, and it is difficult to ima-(221)gine how we should proceed without an exercise of these powers, or most of them, by the federal government. Were each state to regulate its commerce, (a fruitful source of war,) we should not present to foreign nations a single, but a divided front; and it does not require the spirit of prophecy to foresee that the exercise of such a power by the states, would soon lead to a dissolution of the Union. We accordingly find in the 8th sec. of the 1st art. of the constitution of the United States, the states expressly prohibited from the exercise of this power; "To establish an uniform rule of naturalization and an uniform rule of law of bankruptcy:" The exercise of this power by the states would necessarily defeat the object of the constitution. There could not be a uniform system or rule, if twenty different governments had the power to legislate on the subject. It is not only the object of the constitution to have an uniform rule, but public convenience would seem imperiously to require it. We are citizens of the United States, and not of the respective states, and foreign merchants trade with us, and foreign governments recognize us when trading with them, not as the citizens of a district or state, but as citizens of the United States. It would seem to follow that not only the rule of nationalization should be uniform, but the law of bankruptcy should be also uniform; and of this opinion were the supreme court of the United States in the case of Sturges vs. Crowningshield, (4 Wheaton 196.) The power of coining money is expressly given to the federal government and expressly taken away from the states. If this power had not been taken away expressly, I presume little doubt exists, that the states would have retained it, because an exercise of this power by the states would not have been inconsistent with an exercise of it by the federal government; nor would it have been more inconvenient to use the coin of different states than to use the coin of foreign powers.

What I have observed of the powers already noticed, will apply

with equal force to all the powers enumerated (222) in the constitution. Where powers are given exclusively to the federal government, or where expressly taken away from the states, the states cannot exercise them; or when the power given to the federal government, is inconsistent or incompatible with the exercise of that power by the states, the states are excluded. But when power is given to the federal government, and not expressly taken away from the states, and the exercise of such power by the states is not incompatible or inconsistent with the use of it by the federal government, the power is concurrrent. The correctness of the rule, has, I believe, never been questioned. And why should a state be prevented the exercise of a power which is not expressly taken away from her? which is not exclusively given to the federal government, and the exercise of which power by the state, can lead to no inconvenience? Nay, where the exercise of that power, not only does not produce inconvenience to the citizens of the United States, but where the abandonment of it by the state would necessarily lead to great inconvenience, as in the case before the court?

I shall now proceed to enquire if the constitution of the United States has expressly granted to the federal government exclusive jurisdiction over consuls, or if the exercise of jurisdiction in such cases by the states, is incompatible with the exercise of such power by the federal government.

It is no where expressly taken away from the states; if it therefore be not exclusively given to the federal government, or the exercise of it by the states, be not incompatible with the exercise of it by the federal government, I shall conclude, that the states have concurrent jurisdiction.

The words of the constitution are "The judicial power shall extend to all cases in law and equity, arising under this constiution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, in all cases of admiralty and mari-(223) time jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, &c." The words "extend to all cases affecting consuls," do not seem necessarily to imply, that the state courts are excluded jurisdiction. But it is said, that in as much as the word *all* is prefixed "to cases in law and equity; to cases affecting ambassadors; to cases of maritime and admiralty jurisdiction," and is not prefixed "to controversies to which the United States are a party; to controversies between two or more states, &c." the constitution must have intended to give exclusive jurisdiction in the first, and only concurrent in the last. I cannot perceive, that the introduction of the word *all* has produced the small-

est effect on the meaning of this section. Were it omitted altogether, or attached to every branch of the section, its meaning would be the same. "My estate" means all my estate, and "all my estate" can mean nothing more than my estate. I regard the word *all* as surplusage where it does occur, and of course unnecessary where it does not occur. But the invariable practice of our courts will furnish higher testimony of the incorrectness of the construction contended for, than verbal criticism can afford. It will be observed that the word *all* is prefixed to cases of admiralty and maritime jurisdiction, and yet the state courts invariably sustain action for seamen's wages. But can it be supposed that the constitution intended to exclude the state courts from all jurisdiction over consuls, and yet meant to give them concurrent jurisdiction over controversies to which the United States were a party? or to controversies between two or more states? and yet this would be the case, if the construction contended for were to prevail.

As I am not satisfied to give to the word, *all*, in this section, the importance which has been attached to it, I shall proceed to enquire if the power now in question be one of those, the exercise of which by the states would be incompatible with the use of it by the federal government.

(224) Should a consul violate the law of the United States, or the constitution of the United States, or a treaty made by the United States, he ought to be amenable to the federal courts, and so far has the constitution, I think, given jurisdiction to the federal courts: But when a consul offends against the criminal laws of the state, with which the federal courts have no concern, can it produce any inconvenience to permit the state courts to exercise jurisdiction? Can the punishment of an offense against the state laws, operate injuriously to the United States? Were consuls like public ministers, protected by the law of nations, they ought not, and would not be amenable to the laws of either government: But as they are not privileged, because they are not the representatives of their nations, but mere private agents, no embarrassments can follow an exercise of jurisdiction over them by the states, that might not follow an exercise of similar jurisdiction over any other strangers. I am the more disposed to adopt such a construction as would save the criminal jurisdiction of the state, from the difficulty of so reconciling the different parts of the section as would lead to a practical result.

The second paragraph of the section declares, that in all cases affecting ambassadors, public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. Original here appears to mean exclusive jurisdiction. In the case of Marbury vs. Madison, (1 Cranch 174,) this point has been

fully investigated, and I think, satisfactorily decided. Should the state courts then be deprived of jurisdiction, it follows, that consuls are amenable to no court, but the supreme court of the United States. They cannot be tried in the supreme court of the United States for two reasons. 1st. Because the constitution in the very section under consideration, declares, that "the trial of all crimes shall be by jury, and the supreme court of the United States have no jury: And if congress should provide a jury, it would then be impracticable, because, (225) in the very same section, it is further declared that all crimes shall be tried in the state where they have been committed.

The state courts then must retain their jurisdiction, or consuls are virtually amenable to no courts. It is by no means complimentary to the wisdom of those who framed the constitution, to give to it the construction contended for. I believe I do them more justice in supposing, that it was their intention to subject consuls to the jurisdiction of the supreme court of the United States only for violations of the constitution, the laws of the United States and treaties, and from the state courts they did not mean to take jurisdiction over offences against the laws of the state.

There is another view of this subject, which must not be omitted. In the case of Sturgis vs. Crowningshield, (4 Wheaton 197) it was decided, that it was not the mere existence of the power but its exercise which is incompatible with the exercise of the same power by the states. Had the constitution then given to the national government exclusive jurisdiction over consuls, in as much as they have not exercised this power, it is retained by the states.

I am aware, that a distinction may be attempted between the legislative and judicial powers of the federal government, and that my reasoning may be admitted as correct with respect to the former, and be thought inapplicable to the latter. I have only to say in the language of the profound commentator on the constitution, "though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are in the main just, with respect to the former as well as to the latter; and under this impression I will lay it down as a rule that the state courts will retain the jurisdiction they have, unless it appears to be taken away in one of the enumerated modes.

I am of opinion therefore, that the plea ought not to (226) have been sustained, and that the decision of the circuit court ought to be reversed.

JUSTICES BAY AND COLCOCK, concurred.

MR. JUSTICE NOTT dissented.

Whether the consul of a foreign state is amenable to the local jur-

isdiction of the country in which he resides for a violation of the laws of that country, is a question on which I shall give no opinion, because I consider it one belonging to the courts of the United States, to decide, and not to this court. But that the jurisdiction belongs exclusively to the courts of the United States, is too clear to my mind to admit of hesitation. And whether I look to the particular phraseology of the constitution, to the class of cases with which this is associated in that instrument, or to the general policy of the measure, I am equally lead to that conclusion.

The individual states taken unconnected by the articles of confederation, would be considered as separate, sovereign and independent states.

The government of the United States considered in its federal capacity, is constituted of that portion of sovereignty which the individual states have surrendered or thrown into one common stock, for the benefit of the whole. That government therefore is as sovereign and independent over all matters thus surrendered as the government of each state is over those which are retained.

It would seem to result as a necessary consequence of a government so organized, that there must be three distinct classes of judicial cases:

1st. Those of a general nature, involving the interest of the United States in their federal or aggregate capacity.

2d. Those of a mixed character, involving the common and mutual interests of the general and state governments, &c.

3d. Those of a local nature, which belong exclusively to the individual states.

(227) Over the first class, the courts of the general government must be permitted to exercise exclusive jurisdiction.

Over those of the second, they possess a jurisdiction concurrent with the several states.

And the jurisdiction of the third belongs exclusively to the courts of the individual states.

Having thus seen, that these three classes of cases must necessarily exist, the nature of the cases would, in most instances, enable us to refer them to the proper jurisdiction without the aid of the constitution. But the framers of that instrument having considered it a matter of too much importance to be left to construction, have distinctly marked out by metes and bounds the jurisdiction to which each shall belong. The 2d. section of the third article of the constitution provides, that the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be

made under their authority; to all cases affecting ambassadors, public ministers and consuls; in all cases of admiralty and maritime jurisdiction; to controversies between two or more states; between a state and the citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states, and between a state and the citizens thereof and foreign states, citizens or subjects. This section embraces the two first classes above mentioned. It was unnecessary to notice the third, because all cases not delegated to the courts of the United States, belong exclusively to those of the several states. Those belonging to the first class are all cases arising under the constitution, the laws of the United States and treaties made or which shall be made under their authority; all cases affecting ambassadors, public ministers and consuls, and all cases of admiralty and maritime jurisdiction. The second class includes all the other cases which follow in the succeeding part of the section.

I have had occasion heretofore to consider this clause (228) of the constitution. But as that opinion has not been published, I cannot by reference to it show the train of reasoning to which I must now resort in support of my opinion. And I shall therefore be under the necessity of repeating what I have already said on the same subject.

The distinction between the two classes will be discovered in the language of the constitution. The judicial authority of the United States is extended to all those of the first class. In relation to the second the word, *all,* is omitted. If the jurisdiction of the United States courts extends to all of the first class, then there is none to which it does not extend, and the jurisdiction must be exclusive.

To this it is answered, that the addition of that word does not enlarge, nor the omission of it restrict the meaning of the words with which it is connected: That it may be stricken out of the first class or added to the second, and the meaning will be precisely the same. I may perhaps admit, that if it had been carried through the whole section, it would not have given the United States court exclusive jurisdiction over all the cases therein specified; and that the omission of it altogether might not have given the state courts concurrent jurisdiction in all. But it is the addition of it in one part, and the omission of it in another part of the same section, that constitutes the distinction.

I have assumed a position, which, I suppose, will not be denied, that there are some cases which belong exclusively to the courts of the United States. And it must be supposed that it was intended to give the constitution some characteristic feature by which those cases

might be distinguished. And if it be by the addition or omission of a single word and the intention be apparent, we must give effect to it. When we see it studiously repeated in relation to all the first enumerated cases, and studiously omitted when speaking of the second, we cannot suppose, that such a change of phraseology was made without some object. It would be doing injustice to the venerable authors of that instrument, every word of which may be (229) looked upon almost as a monument of prophetic wisdom, to suppose, that it happened by accident and not by design. And if it may produce the effect which I have supposed, and can produce no other, then we have a right to conclude, and indeed I think we are bound to conclude, that, that alone was the object and no other. I apprehend, that it will be admitted, that all the other cases comprised in the same class belong exclusively to the courts of the United States: And if so, I cannot perceive upon what principle this particular case can be denied that privilege.

If however I am mistaken in supposing, that, that point will be conceded, I must once more reconcur to the cases there mentioned, and I think, from an attentive perusal of them, the conclusion will appear inevitable. The first are cases arising under the constitution; the laws of the United States and treaties made under their authority. When the United States in a federal capacity assumed the powers of sovereignty, it became necessary that they should possess all the means of carrying those powers into effect. That the operations of every government should be carried on through the instrumentality of its own agents, is an essential attribute of sovereignty. And for that purpose the powers of the legislature and judiciary must be co-ordinate and correlative. It was particularly proper therefore, that all those cases should be given exclusively to the court of the United States; otherwise the general government would be indebted to the courtesy of the states, for the exercise of their most important functions. That questions of this sort may come incidentally before the state courts and must be decided by them, I have no doubt. Such were the cases of Potter and Bulow vs. the City Council, and Alexander vs. Gibson, (1 Nott & M'Cord 527, 480,) decided in this court. But I presume it will not be contended, that we have a direct authority over such cases.

The next description of cases embraced in its catalogue are cases affecting ambassadors, public ministers and consuls. To these it is answered, that ambassadors and (230) public ministers are not amenable even to the courts of the United States. That is a question on which it is not my intention to give any opinion. It is sufficient for my purpose, that those who made the constitution supposed, that such

cases might arise, and made provision for them by consigning them exclusively to those courts. Can it be supposed, that the persons to whom was confided the important duty of forming the constitution, did not foresee the difficult and delicate questions which would necessarily arise out of our relations with foreign nations? Ambassadors and public ministers represent the persons of their sovereigns. Their business is with the United States, and not the individual states. And it would have been unwise and improper to have hazarded the peace of the country by subjecting their rights or persons to the jurisdiction of the state courts over which the general government had no control. It was equally for the peace and security of the country and foreign ministers, that all cases affecting them, should be placed in the hands where it appears to me most manifest, that they have been placed.

The last description of cases included in this list, is cases of admiralty and maritime jurisdiction. These cases springing out of the source from whence most of our collisions with foreign nations might be expected to arise, it was equally necessary and proper, that those also should be confined to the tribunals of the general government. But I believe it is so universally admitted, that the state courts have no jurisdiction over admiralty and maritime cases, that I will not dwell longer on the subject.

I have now gone through with all the cases over which I consider that the courts of the general government have exclusive authority. And when I find consuls included in the same catalogue, and coupled in the same sentence with ambassadors, and other foreign ministers, I feel bound to consider them as entitled to the same privileges. I do not mean the same privileges allowed by the laws of nations to ministers of a higher grade, but to the (231) privilege afforded them by the constitution of being tried in the courts of the United States. The same principle of policy which prescribed the jurisdiction of the other enumerated cases equally required that the consuls should be included also. They are the public agents of foreign nations. They have many important public duties to perform. They constitute a link in the chain of our foreign relations, which ought not to be broken by the interference of state authority.

We have had a recent instance of the deep interest which governments take in the privileges of their foreign agents, in the case of the American consul, who was lately imprisoned in Spain: And we cannot suppose that other nations take less interest in their safety than our own. It is a case in which the pride and honor of a nation is concerned, and respecting which it cannot feel indifferent. Indeed, I consider it a question on which the peace of the United States may so much depend, that I cannot but feel some regret that any difference

of opinion should exist in this court on the subject. This defendant, I understand, is now the consul of France in another state. Ought he to be drawn from his public duties to save his recognizance from forfeiture? Or be detained from them to atone for his offence by any authority under the state? Suppose he should be imprisoned, and his government should think he had been wronged? Redress would be sought for from the general government, and not from this. If the case was in a court of the United States, the president, from motives of policy, and for the sake of peace, might discharge the prosecution, remit the recognizance or pardon the offence. But he can have no control over it, if the jurisdiction belongs to the state courts. As far, therefore, as policy can influence the decision, it is strongly opposed to the power which we are about to exercise.

There were but two grounds taken in the argument on which I felt any difficulty. The first was, that the immunity allowed by the constitution to consuls relates only (232) to transactions connected with their consular functions. The second, that until congress shall make some provision to enable the courts of the United States to exercise their authority, the jurisdiction remains in the state courts.

But a moments reflection dissipated all my doubts on the first point. It not only presupposed a right to enquire into the fact of his consularship, but also the extent of his powers and the duties of his office. That is to say, the court may give itself jurisdiction by stripping him of his consular character, or limiting his powers, and then try him for his offence. *"Castigatque, auditque dolos."*

With regard to the second question, I am not satisfied that congress has not made all the provisions necessary to enable the courts of the United States to exercise the jurisdiction vested in them by the constitution, if any such provision was necessary. But it appears to me a question not material to the decision. If the constitution has given the jurisdiction, exclusively to the general government, the omission to exercise it, cannot give jurisdiction to the states. Suppose congress had omitted to provide for the punishment of treason or piracy, would the state courts thereby acquire jurisdiction over those offences? I apprehend not.

From any view, therefore, which I have been able to take of the question, I have seen no reason to change the opinion given in the court below. Indeed my confidence in that opinion is increased by the support which it has derived from the very able view taken of a similar question by Chief Justice Tighlman, in the case of Commonwealth of Pennsylvania vs. Kosloff. (2 Am. Reg. 340. see also Mannhardt vs. Soderstrom, 1 Fin. 138.)

I am disposed to support the sovereignty of the states, but not to

invade that of the United States, nor to violate the relations subsisting between them. I am afraid that the jarring elements of which our confederacy is composed, are bound together by but feeble hands at best; and I am not disposed to weaken them by assuming an (233) authority which we do not possess, or even wishing for a jurisdiction which we cannot safely exercise.

I am of opinion, therefore, that this motion ought not to prevail.

JUSTICES JOHNSON AND GANTT, concurred.

N. B.—The judges were equally divided in the above case, but as by act of assembly "the opinion of the judge who tried the cause, (Mr. Justice Nott) shall not be allowed, and shall have no effect in the final determination of the case," Mr. Justice Huger's opinion is the judgment of the court.

(a.)—Burlam. Prin. Pol. Law, 424, part 4, Chap. 15, Molloy *de jure* Mar. *et* Naval. B. 1 C. 10. Martens' Law of Nations, B. 7. C. 5, Sec. 1, 2, 3, 4. Barbuit's Case, case temp. Talbot 281. Triquet *et al.* vs. Bath, 3 Bur. 1478. S. C. 1 Black, 471.

(b.)—1 Beawes, Lex Mercat. 291. Wickquef. Rights of Em. 40, Martens' Law of Nations, B. 4, C. 3, Sect. 8, and notes. Brown's Admiralty Law 505. Barbuit's Case, temp. Talbot, 283. Marshall vs. Critico, 9 East, 447. Clarke vs. Cretico, 1 Taunton, 108. 1 Bac. Abr. tit. Ambassadors.

STEIN v. BOWMAN, (1839, U. S.)
13 Pet. 209.
M'Lean, Supreme Court.

(217) Mr. Justice M'Lean delivered the opinion of the court.

(Extract) This case was brought originally in the district court of the United States for the eastern district of Louisiana; and on the trial certain exceptions were taken to the ruling of the court by the (218) plaintiff, and which he now brings before this court on a writ of error.

The action was brought by petition, in the form peculiar to the courts of Louisiana, to compel the defendant to render an account as curator of the estate of Nicholas Stone, or Stein, deceased.

The plaintiff represents himself as an alien, and as the only heir at law of the deceased.

Some time after the defendant had answered the petition, Johann Stein, and others, filed their petition of intervention, denying the statements in the plaintiff's petition, and representing themselves to be the true heirs of the deceased.

The cause was submitted to a jury; and on the trial, to sustain his case, the plaintiff offered in evidence certain German documents,

for the purpose of using such parts of them as contained the depositions which related to the pedigree of the plaintiff; which were overruled by the court, on the ground that they were not duly authenticated. And this constitutes the first exception.

Several depositions appear to have been taken, but none of them were signed by the deponents. At the close of them it is stated: "After the preceding depositions were read to the deponents, they gave their assent to them and approbation.

[Seal.] (Signed) R. V. D. BUSSEKE.

Seen, for attestation of the preceding signature, of the Royal Amtsvagtey Burgwedel.

Luneburg.

Royal British Hanoverian Landdrostey.

[Seal.] RUEMERN."

To which is added:—

"The subjoined signature of the royal Britannic Land Bailiwick at Luneburg is hereby attested.

Hamburg, Sept. 19th, 1834

Royal Britannic Hanoverian Minister Residentis.

Im Ausftrage by authority. G. W. KERN."

[Seal.]

In the case of Church vs. Hubbart, 2 Cranch, 187, this court held that a certificate of a consul under his consular seal, is not a sufficient authentication of a foreign law to go in evidence; it not being one of his consular functions to grant such certificates. And also that the proceedings of a foreign court, under the seal of a person who styles himself the secretary of foreign affairs in Portugal, is not evidence.

On the principle of this case, it would seem that the court very properly rejected the depositions offered.

The certificate and seal of the minister resident from Great Britain in Hanover, is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take (219) depositions. It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office.

The authority to take the depositions by the person before whom they were taken no where appears; and it is not shown that the Royal Britannic Hanoverian Land Bailiwick, Ruemern, was authorized to attest, as he has done, the signature of R. C. D. Busseke.

If the attestation of the signature, and right of the person who administered the oaths, were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *prima facie*

evidence, though not under the great seal of the state. It may be proper, however, to remark, (though the point was not raised in the court below,) that if the authentication had been sufficient, the depositions would have been inadmissible, they not having been taken under a commission; which is the only mode by which depositions in a foreign country can be taken.

STEIN v. STEIN'S CURATOR et al., (1836, U. S.)
9 La. Rep. 277.
Bullard, Supreme Court of Louisiana.

(280) (Extract) The document in the German language was rejected by the court, on the ground that it was not sufficiently authenticated. The only intelligible certificate annexed, is one by the American consul at Hamburg, "That F. W. Kern, whose signature is on the annexed documents, is the chancellor of the Hanoverian embassy to Hamburg, and that full faith and credit was due to the same." We are of opinion that the court did not err in rejecting the evidence. It does not appear to be one of the duties of American consuls in foreign countries, to attest the signatures of public functionaries in countries in which they reside. Church v. Hubbard—2 Cranch's Reports, 187, 237; 4 Martin's Reports, 285 and 85.

STEWART v. LINTON, (1902, U. S.)
204 Pa. 207; 53 At. 744.
Per Curiam, Supreme Court of Pennsylvania.

Appeal from court of common pleas, Armstrong county.

Action by John Stewart against Phœbe R. E. E. Linton and Adolphus F. Linton. From an order making absolute a rule for judgment for want of a sufficient affidavit of defense, defendants appeal. Affirmed.

The *feme* defendant filed an affidavit of defense, which was as follows:

"That at the time of the execution of the mortgage in suit, and the power of attorney upon which the actions of John B. Finlay were based, she was a married woman, and was domiciled in the city of London, England, in the kingdom of Great Britain; that said mortgage in suit was executed by one John B. Finlay, who held what purported to be a power of attorney for the purpose from this deponent, which said power of attorney was never legally executed by this deponent; that in the year 1891 this deponent and her husband, Adolphus F. Linton, attempted to execute a power of attorney in London, England, kingdom of Great Britain, empowering the said

John B. Finlay to transact business for them in the United States of America; that in the execution of said idea they went before the deputy consul general of the United States of America, resident in London, England, and signed such a power of attorney, and at that time they were informed that he (the deputy consul general) had not the power to legally take the proper acknowledgment to the same, and that it was arranged that they (this deponent and her husband, Adolphus F. Linton) should return to the consulate the next day, and go before the consul general, who had the power to take the proper acknowledgment, and properly execute the said power of attorney; that thereupon they left the said incompleted power of attorney with the deputy consul general, and left the said consulate; that, on reflection and consideration, she (Phœbe R. E. E. Linton) decided not to execute said power of attorney, and that she (the said Phœbe R. E. E. Linton) and Adolphus F. Linton never returned to the said consulate, and never did, in fact, execute the said power of attorney, and that the said power of attorney with which the said John B. Finlay attempted to charge the land of this deponent with debts was procured by fraud; that this deponent asserts as a fact that after the refusal of this deponent and her husband, Adolphus F. Linton, to return to the consulate of the United States in London, England, the said John B. Finlay, by a fraud and in collusion with a clerk in the consulate, procured the power of attorney, which had been signed, but not executed, by this deponent and her husband, Adolphus F. Linton, and caused the erasure of the name of the deputy consul general, and procured or caused to be procured the signature of the then consul general of the United States of America resident in London, England (John C. New), to the acknowledgment, and as a witness to the said power of attorney, without this deponent and her husband appearing before the said John C. New, consul general as aforesaid, and that thereafter the said John B. Finlay came to America, and began to use the said power of attorney to charge the lands of this defendant with debts, wholly for the use of the said John B. Finlay, personally; that, upon being advised of this fraudulent use of the said power of attorney, your deponent immediately revoked the same; that the mortgage in suit is one of the incumbrances placed upon this deponent's property by the said John B. Finlay, acting under said power of attorney, before the knowledge of the fraudulent actions of the said John B. Findlay came to this deponent; that this deponent never received any of the consideration money mentioned in the mortgage in suit."

The opinion of the lower court was substantially as follows:

"Nor do we think the position that a deputy consul general had

no right to take acknowledgment is sustained by reason or authority. The act of January 16, 1827 (P. L. 9), provides that the acknowledgment of a deed by married women or others may be taken in any foreign country, before any consul or vice consul of the United States appointed for that country. The act of April 9, 1849 (P. L. 527, § 12), provides that the written consent of a married woman to the conveyance of her property may be acknowledged out of the United States before any minister, ambassador, *charge d' affaires,* consul, or vice consul. The act of April 2, 1859 (P. L. 352), provides that all ambassadors, ministers plenipotentiary, *charges d' affairs,* or others exercising public ministerial functions, may take the acknowledgment of any person. Rev. St. U. S. § 1674 [U. S. Comp. St. 1901, p. 1149], provides that consular officers shall include consul generals, consuls, commercial agents, and none others. Rev. St. U. S. § 1750 [U. S. Comp. St. 1901, p. 1196], provides that every secretary of legation and consular officer shall have power to perform any act which any notary public is authorized to perform within the United States. It has been held that the acknowledgment of a married woman before a United States commercial agent in Canada is sufficient. Moore v. Miller, 147 Pa. 378, 23 Atl. 601. If the allegation is that the deputy consul general had no right to take the acknowledgment, that position is equally untenable. 'An American consul in foreign countries can take an acknowledgment; a deputy, in the name of his principal.' 1 Am. & Eng. Enc. Law (1st Ed.) p. 144. Even if the acknowledgment had been defective, it is cured by the act of June 1, 1891 (P. L. 159), which provides that all conveyances heretofore or hereafter acknowledged before any deputy consul * * * shall be valid, to all intents and purposes, as if the same had been acknowledged before a notary public.

"As to the other defense, of want of consideration, it is not well taken. An affidavit of defense to a *sci. fa.* on a mortgage which denies the indebtedness, but fails to deny the execution of the mortgage, is insufficient to prevent judgment. May v. Meehan, 159 Pa. 419; 28 Atl. 204; Woods v. Watkins, 40 Pa. 458; Stoddart v. Robinson, 54 Pa. 386. It may be true that Mrs. Linton received no part of the consideration money of the mortgage. But there is no denial that her attorney in fact did receive it by virtue of the power she had placed in his hands. The affidavit of defense admits that there was an appearance before an officer that we have found competent to take the acknowledgment, and that the attorney in fact 'attempted' to execute it. That being the admitted fact, we think the official certificate is conclusive of every fact appearing on its face. When the affiant further swore she never 'legally' executed, she drew a wrong legal con-

clusion. An affidavit of defense should state facts, not conclusions. On the whole, it seems to us that the affidavit of defense is but a flimsy pretense to postpone the collection of an honest debt."

Argued before McCullum, C. J. and Mitchell, Dean, Fell, Brown, Mestrezat, Potter, JJ.

Calvin Rayburn, for appellants, Ross Reynolds, for appellee.

Per Curiam. In her affidavit of defense, Mrs. Linton does not aver that she did not appear before the deputy consul general and separately acknowledge her power of attorney to Finlay, and her evasiveness on this point must be regarded as her admission that she did so appear and make the statutory acknowledgment. She, rather, relies upon her averment that her acknowledgment before the deputy consul general was invalid, in which she is mistaken, as is clearly shown by the learned judge below in his references to the several acts of assembly upon the subject. In all other respects the affidavit of defense is insufficient, and the judgment, for want of its sufficiency, is affirmed.

STIFF v. NUGENT, (1843, U. S.)
5 Rob. 217.
Bullard, Supreme Court of Louisiana.

(Extract) There is a bill of exceptions taken by the defendants, to the admission of the return of a commission, purporting to have been executed by the vice-consul of the U. S. at Liverpool, upon the proof of his reputed character, and that he acted as vice-consul in 1837, and upon proof also of the handwriting of said person. The court did not err. The commission was addressed to the consul, or vice-consul of the U. S., as commissioner named by the court, and it is sufficiently shown, that it was executed by him in that capacity.

STURGIS v. SLACUM, (1836, U. S.—Argentine)
18 Pick. 36.
Wilde, Supreme Court of Massachusetts.

Under the act of congress of 1792, c. 24, empowering consuls of the United States to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, and therewith "to pay the debts due from his estate which he shall have there contracted," a consul is not authorized to pay a claim, not reduced to a judgment, for damages for a wrongful act committed by the deceased.

The defendant, who was a consul of the United States at Buenos Ayres, being about to visit the United States, appointed K. acting consul during his absence, but the *chargé d'affaires* of the United States at Buenos Ayres refused to recognize K. as such, and performed the duties of consul himself, until the appoint-

ment of K. was approved by the government of the United States; and in consequence of such refusal, K. was prevented from receiving the emoluments of that office for several months. The *chargé d' affaires* subsequently died intestate, and the defendant, in pursuance of the act of congress of 1792, c. 24, took possession of his property, and, having sold it, transmitted to the plaintiff, who was appointed administrator in this state, an account of the disposition made of it, showing a balance in favor of the estate, which the defendant claimed to retain on account of the intestate's refusal to recognise K. as acting consul. It was held, that the defendant, by setting up such claim, ceased to act under that statute; that he had no lien on the property for the alleged tort of the intestate; and that an action at law might be maintained by the plaintiff against him, in this state, to recover such balance.

Assumpsit. The parties stated a case.

In April 1825, John M. Forbes, the plaintiff's intestate, was appointed *chargé d' affaires* of the United States to the government of Buenos Ayres, and continued to reside there as such until his death in June 1831. The defendant was appointed consul of the United States at Buenos Ayres in 1824, and upon the death of the intestate, under color of his consular office, took into his possession certain personal property there, belonging to the intestate, and caused it to be sold by public auction, the intestate having no legal representative or other person authorized to take charge of such property, in Buenos Ayres. From the proceeds of the sale, the defendant paid certain debts due from the intestate at Buenos Ayres; and in August 1832, stated an account of such payments and of the proceeds of such sale, showing a balance in favor of the estate of the deceased, amounting to about 5000 dollars. The defendant alleged in the account, that he retained this balance in satisfaction of a claim against the estate of the intestate. The account was transmitted to the plaintiff.

(37) The claim of the defendant referred to in the account arose from this cause. On October 31st, 1825, the defendant, being about to visit the United States, executed an instrument, whereby, so far as he had authority, he appointed Robert Kortright, a citizen of the United States, then residing at Buenos Ayres, his agent in all matters appertaining to the consular office and acting consul, during the defendant's absence from Buenos Ayres. Kortright accepted the appointment, and the defendant gave notice thereof to the intestate, and requested him, as *chargé d' affaires,* to recognize Kortright as such acting consul, to present him as such to the government of Buenos Ayres, and to procure his recognition by that government. But the intestate refused to comply with such request.

By this refusal, Kortright was prevented from exercising the duties of that office, and from receiving the income and emoluments thereof, for several months. The government of the United States af-

terwards approved of the appointment of Kortright by the defendant, as acting consul during his absence from Buenos Ayres; and the secretary of state of the United States, by a letter, dated February 16th, 1827, gave notice to the intestate of such approval, and directed him to recognize Kortright as acting consul, and to request his recognition by the government of Buenos Ayres. On the receipt of this letter, Kortright was so recognized, and entered on the duties of the office.

The intestate, from October 31st, 1826, until he received the letter from the secretary of state, assumed and performed the duties and functions of such consular office. The defendant had no evidence showing the amount of the income and emoluments of the office during that period; but he asserted, that they exceeded the balance of the account. There was no evidence that the intestate charged any fees for executing the duties of the office. Kortright testified in his deposition, taken on the part of the defendant, that there was no agreement between him and the defendant to divide the fees of the office.

If upon these facts the plaintiff was entitled to recover in this action, judgment was to be rendered in his favor for such (38) damages as the court should order; otherwise, judgment was to be rendered for the defendant.

C. P. Curtis, for the plaintiff.

J. Mason, *contra*. The defendant is not liable in any action at law to this plaintiff. The proceedings should have been in the probate court, or by a bill in equity. Under the act of congress, of 1792, c. 24, the defendant became, in fact, the administrator of the intestate. As such he was independent of the administrator in this state, and not subordinate or ancillary to him. There is a total want of privity of contract between the plaintiff and the defendant, and the law will not raise an assumpsit. Grout v. Chamberlin, 4 Mass. R. 611; 1 Wms. on Executors, 595; Hagthorp v. Hook, 1 Gill & Johns. 270. The power of an administrator is limited to the jurisdiction within which administration is granted. The property in Buenos Ayres did not vest in the administrator here, and could not be interfered with by him. Goodwin v. Jones, 3 Mass. R. 514; Stevens v. Gaylord, 11 Mass. R. 236; Hooker v. Olmstead, 6 Pick. 481; Harvey v. Richards, 1 Mason, 381.

WILDE, J. delivered the opinion of the court. This is an action of assumpsit, in which the plaintiff claims to recover a balance in the hands of the defendant, in the capacity of administrator of the goods and estate of John M. Forbes, lately deceased. The intestate was

chargé d' affaires of the government of the United States to the government of Buenos Ayres, and died at Buenos Ayres in the year 1831. At the time the defendant was consul of the United States at that port, in the exercise of the duties of that office; and thereupon took into his possession certain personal property of the deceased, there being, and caused the same to be sold at public auction and out of the proceeds paid certain debts of the intestate due at Buenos Ayres, and afterwards transmitted an account thereof to the plaintiff, in which he acknowledges a balance in his hands, which he claims to retain on account of a claim he had on the estate of the intestate.

These proceedings are authorized by the act of congress of the United States, 1792, c. 24, § 2.

The defence set up is, that the defendant was, by virtue of (39) his consular office and such act of congress, an administrator of the estate of the intestate within the government of Buenos Ayres; that he is only liable to account in the manner prescribed by statute; and that he is not amenable to the plaintiff within this jurisdiction, and especially not in an action at law. There can be no doubt that this defence would prevail, if the defendant had been appointed administrator in the usual manner. When there are two or more administrators appointed on the estate of a person deceased, under different governments, they are in no respect accountable to each other; but each must administer the estate of the deceased within the jurisdiction where he was appointed, and is to account for it to the court from whom he received his appointment. And that court may order distribution according to the laws of the country where the deceased had his domicile at the time of his death; or may order the balance to be transmitted to the administrator appointed in the country where he had his dimicile. Perhaps after such an order of transmission, an action would lie in favor of the principal administrator; for where any one is under a legal obligation to pay, the law will imply a promise. But however this may be, it is quite clear that without such order no such action could be maintained, the administrations being distinct, and there being no privity between the parties.

We are however of opinion, that the defendant is not to be regarded as an ordinary administrator, but as a receiver or agent appointed by law, and whose duties are prescribed by the statute. These duties in some respects resemble those of ordinary administrators; but in one respect there is an important difference.

The act provides, that the consuls shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate which are contracted there; shall sell the estate and remit the balance remaining in their hands to the treasury of the

United States, to be holden in trust for the legal claimants. But if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings. If the defendant had complied with the directions of the statute, and (40) had transmitted the balance in his hands to the treasury, as he was bound to do, he would have been protected by the statute. But as he elected to retain the balance, to answer his own claim, he cannot now defend himself under the statute. After setting up his own claim, he ceased to act under the statute; and unless his claim was a valid one, he was bound to pay over the balance to the plaintiff, whom he has recognized as the legal representative of the deceased; and this by the express words of the statute. Ever since transmitting his account to the plaintiff, he has ceased his proceedings under the act of congress, and the only question now is, whether he has a right to retain the balance to answer his own claim. There is no pretence that there are any remaining debts due in Buenos Ayres, and if there were, the defendant is no longer liable for the payment. Has he then any lien on the money in his hands on account of his own claim? The general rule is, that a factor has no lien for a general balance in respect of debts which arise prior to the time at which his character of factor commenced. Montague, 35; Houghton v. Matthews, 3 Bos. & Pul. 485. And we perceive no good reason why the same rule should not be applied in the present case. But it is not necessary to decide the present case upon this principle; for I apprehend it is very clear, that no factor or agent has any general lien in respect to torts. He may retain the balance, to be sure, and suffer himself to be sued, and obtain a set-off through the medium of a cross action; but he has no lien, and no legal right to retain the money in his hands.

And there is another difficulty. We do not perceive any legal ground on which the defendant's claim can be sustained. Kortright, if any one, was the party injured by the supposed misconduct of the intestate. He would have been entitled to the fees and emoluments of the office in the absence of the defendant, and he testifies, that there was no agreement between him and the defendant to divide the fees. And if there had been such an agreement, the intestate would have been still liable only to Kortright.

But at all events, the defendant cannot retain the balance in his hands on this account. The act of congress only authorizes him to pay the debts of the intestate contracted in Buenos (41) Ayres, and not to pay damages for wrongful acts, which, by the principles of the common law, are not recoverable after the death of the tortfeasor.

It appears to us, therefore, that there is no legal ground on which the defense can be maintained; and according to the agreement of the parties, judgment is to be rendered for the plaintiff.

SUGENHEIMER, IN RE, (1899, U. S.)
91 Fed. Rep. 744.
Brown, District Court.

In bankruptcy.

BROWN, District Judge. The referee in charge has certified to the court for decision the question whether certain powers of attorney had been properly executed so as to allow a vote by proxy upon a claim of the firm of George C. Mecke & Co. of Bremen, Germany, against the bankrupt. The creditor firm executed before the United States consul at Bremen on February 12, 1897, a very broad power of attorney, which I find was sufficient to authorize proof of their claim in bankruptcy, and a vote in the bankruptcy proceedings, either by the attorneys, or by their substitutes, if the powers were properly executed.

It is objected that rule 21 of the supreme court in bankruptcy (18 Sup. Ct. VII.) subd. 5, provides only that "the execution of any letter of attorney to represent a creditor...may be proved or acknowledged before a referee or a United States commissioner, or a notary public," but does not admit proof or acknowledgment before a foreign consul.

The language of the rule, it will be observed, is not exclusive, and the different clauses taken together seem to indicate that the proof of claims of foreign creditors was not within the contemplation of the court in framing this part of the twenty-first rule. Section 20 of the act of congress, provides that "oaths" required by the act may be administered"...(3) by diplomatic or consular officers of the United States in any foreign country." It is hardly to be supposed that the court could have intended to exclude the proof of foreign letters of attorney before such officers as United States consuls, when these are expressly empowered by the act to administer oaths in bankruptcy proceedings. I therefore decide that the acknowledgment of this power of attorney was sufficient.

2. Mecke & Co. of New York, the attorneys named in the above power of attorney, by Hugo Volkening, one of its members, executed on December 28, 1898, in New York, a letter of attorney appointing three substitutes to vote at creditor's meetings as proxies for the Bremen firm, and acknowledged it before E. A. Pfeffer, one of the substitutes. This power authorizes the three substitutes or "either

one of them" to vote at creditors' meetings upon the claim of the (745) Bremen firm. I think the acknowledgment before Pfefler was irregular as respects him. I see no reason, however, why it should not be valid as respects either of the others, so that either of the other two substitutes may lawfully act under it.

Ordered accordingly.

TARTAGLIO, IN RE, (1895, U. S.—Italy)
83 N. Y. Supp. 1121; 12 Misc. 45; 5 Moore 124.
Silkman, **Surrogate's Court, New York.**

CONSULS—AUTHORITY—COLLECTING MONEY FOR COUNTRYMEN

A consul of a foreign country in the United States has authority to receive the distributive shares to which persons residing in his country are entitled from the estate of a person dying in the United States.

Application by the Italian consul general to compel the payment to him of the distributive shares of the widow and minor children of Libretto Tartaglio, deceased. Granted.

D. Humphreys and C. H. Ostrander, for petitioner.
Wilson Brown, Jr., for county treasurer.

SILKMAN, S. Application is made by the consul general of Italy at New York to have paid to him the distributive shares of (1122) the widow and five minor children in the estate of Libretto Tartaglio, an Italian subject, who died leaving personal property which has been administered in this country, and which distributive shares have been deposited with the county treasurer pursuant to a decree of this court. The widow and children are residents and subjects of the kingdom of Italy. The county treasurer opposes the application upon the ground that the consul general has no authority to receive such distributive shares, and give such an acquittance as will relieve him from responsibility. The rights of subjects of foreign countries, both as to their persons and property, largely depend upon treaty provisions. The treaty between the United States and the kingdom of Italy provides that consuls general "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen." The term "defend," as used, is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights. But, in the absence of such treaty pro-

vision, a foreign consul would have much the same power. We find the rule laid down in Kent: "The practice of our courts is that a foreign consul may assert and defend as complainant party the rights and property of a person of his nation." The consul of a foreign nation recognized by the United States is competent to defend and watch over the interests of persons of his nation, and may bring suits for such purpose without any special authority from the parties in interest. The Bello Corrunes, 6 Wheat. 168. The court says, in the case cited, "that a vice-consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects wherever the pursuits of commerce may draw them or the vicissitudes of human affairs may force them is the great object for which consuls are deputed by their sovereigns, and, in a country where laws govern and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it." Foreign consuls have authority and power to administer on the estates of their fellow subjects deceased within their territorial consulate. Wheat. Int. Law (2d Eng. Ed.) 151; Wools. Int. Law, § 96: The right to demand and sue for necessarily implies the authority to acquit and release. In case of a debt due by a resident of this state to the widow and children of Libretto Tartaglio, there would seem to be no doubt not only of the consul's power, but his duty, under the authorities, to demand and collect it, and, if so, I can see no reason in principle that would prevent his demanding and receiving moneys or property (1123) deposited in court belonging to a subject of such consul's country. Neither can I see that the infancy of some of the parties affects or limits the right or power of the consul. The question as to what disposition may be made of the property after the consul has received and exported it is something with which our courts have nothing to do; that is to be settled by the laws of authority of the government to which the foreign subject owes allegiance. An order will be made directing the county treasurer to pay the distributive shares of the widow and children of Libretto Tartaglio in his estate, deposited with said county treasurer pursuant to the decree of this court, to the consul general of Italy at New York, upon his executing and delivering a proper receipt therefor. Ordered accordingly.

TELEFSEN v. FEE, (1897, U. S.—Norway)
46 N. E. 562; 168 Mass. 188.
Lathrop, Supreme Court of Massachusetts.

Exceptions from superior court, Suffolk county; John Hopkins, judge.

Action by one Telefsen against one Fee for assault and battery committed by defendant in arresting plaintiff. There was a verdict for defendant, and plaintiff brings exceptions. Sustained.

The substantial facts set forth in the bill of exceptions are as follows: Defendant was a constable of the city of Boston. One Johannessen sued out a writ from the municipal court of that city to recover wages alleged to be due him as one of the crew of a steamship of which Telefsen was captain, and on this writ an affidavit had been put, signed by a master in chancery, authorizing the arrest, both writ and affidavit being in proper form. Telefsen was a Norwegian subject in command of the steamship, which was a Norwegian vessel flying the Norwegian flag, and was about to leave the port. Johannessen was a Norwegian, and had shipped at New York for the run to Boston without signing shipping papers. He left the ship at the latter port, "because his term of service had expired." The arrest was made on the deck of the vessel, while she was lying on the side of the wharf in Boston, at a place within the territorial jurisdiction of the municipal court. Defendant was informed before making the arrest that the vessel was Norwegian; that Telefsen was a Norwegian subject, and was captain; and that the claim would be adjusted at the consulate of Sweden and Norway, there being such consulate in Boston. After the arrest defendant detained Telefsen on the vessel until he paid, under protest, the amount alleged to be due. Plaintiff asked the court to rule that, by the treaty between the United States and the kingdom of Sweden and Norway, he was at the time exempt from arrest, and that the process was not sufficient to justify the arrest under the circumstances disclosed, plaintiff being a Norwegian and upon and in command of a Norwegian vessel; but the court declined, upon all the evidence, so to rule, and ruled that defendant was justified in making the arrest, unless the jury found that he used excessive force. Plaintiff excepted to the ruling and the refusal to rule, and the jury returned a verdict for the defendant.

John Lowell and Edward S. Dodge, for plaintiff. Bordman Hall, for defendant.

LATHROP, J. The municipal court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johannessen, and the writ upon which

the plaintiff was arrested on mesne process was of no effect. By article 13 of the treaty between the United States and Sweden and Norway of 1827 (8 Stat. 352), it is provided that "the consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country; or the said consuls, vice consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment, or arbitration, shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." There are similar treaties with other countries, including one with Prussia in 1828 (8 Stat. 382). Many of these treaties are referred to in 7 Am. Law Rev. 417. Later treaties have been made with the Netherlands in 1855 (10 Stat. 1155), with Denmark in 1861 (13 Stat. 605), with Germany in 1871 (17 Stat. 921), and with Italy in 1878 (20 Stat. 729). By article 6 of the constitution of the United States, it is declared that "all treaties made, or which shall be made under the authority of the United States , shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Such a treaty as that with Sweden and Norway has been almost uniformly held to take away all right of action for wages in the courts of this country, by a seaman coming within the scope of the treaty, whether the action be in rem or in personam. Norberg v. Hillgreu, 5 N. Y. Leg. Obs. 177; The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4, 426, where the question is considered at length; The Salomoni, 29 Fed. 534; The Burchard, 42 Fed. 608; The Marie, 49 Fed. 286; The Welhaven, 55 Fed. 80. In The Amalia, 3 Fed. 652, jurisdiction was entertained by Judge Fox of the United States district court in Maine of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. But this case has no bearing upon the one before us. An examination of the treaties and authorities above cited makes it plain that the court has no discretion in the matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consul, vice consul, or a commercial agent, he alone has authority to act in determining in the first instance whether wages are due, and the amount.

(564) It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway, and this right is insisted upon by our government. In the United States consular regulations of 1888 (page 25, par. 66), under the title "Jurisdiction over Dispute between Masters, Officers, and Crews," appears the following: "Exclusive jurisdiction over such disputes in the vessels of the United States, including questions of wages, is conferred by treaties or conventions with" several governments named, and, among them, Sweden and Norway. And on page 92, par. 273, is also the following: "In many instances, by treaty and consular convention, the United States have secured to their consular officers jurisdiction over questions of wages, shipment, and discharge of seamen."

The bill of exceptions is not so full as it should be as to what occurred on the arrival of the ship in Boston. It is merely said that "Johannessen left the ship at Boston because his term of service had expired." It does not appear whether he had been discharged, or had left without permission of the master, though, perhaps, the more reasonable interpretation of the exceptions is that the statement of the cause of his leaving precludes our assuming other reasons to exist. However, this may be, whether he was discharged or not, there was still the question of wages to be determined; and the defendant had been informed, before he made the arrest, that the claim of Johannessen would be adjusted at the consulate of the kingdom of Sweden and Norway. It seems to us impossible to say that there was not such a difference between the master and Johannessen that the consul had not exclusive jurisdiction in the premises. The facts in the case of The Elwine Kreplin are not fully set forth in the report in 9 Blatchf. 438, Fed. Cas. No. 4, 426. But they are found at length in the report of the case in the district court (4 Ben. 413, Fed. Cas. No. 4,427). It was there considered by Judge Benedict that the connection of the men with the ship was severed by mutual consent, and that they were entitled to their wages. While this view of the facts was not fully assented to by Judge Woodruff, his opinion was that, although the men were entitled to their discharge and to be paid off, and the master was in the wrong, yet this matter of difference "was left by the treaty in the hands of the consul," and the libel of the seamen was dismissed. In The Burchard, 42 Fed. 608, Judge Toulmin dismissed a libel for wages against a German vessel brought by an American seaman who had shipped on board, and who claimed to be entitled to a discharge. He stated, however, that he was inclined to take jurisdiction, if the fact had been proved that a discharge had been granted. In the latter case of The Welhaven, 55 Fed. 80, a

libel was brought against a Norwegian steamship by a citizen of the United States, for damages and for wages, alleging that he shipped on the vessel at Mobile, for a round voyage to Tampico, and that, on his arrival in Mobile Bay on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. On the intervention of the Norwegian consul, claiming jurisdiction, Judge Toulmin sustained the consul's position, and dismissed the libel. The case appears to have been heard on exceptions to the libel, as the judge concludes the opinion thus: "I am, therefore, constrained to sustain the exceptions to the libel, and to order that the libel be dismissed."

It appears, therefore, that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between Johannessen and Telefsen, and that the municipal court of the city of Boston had no jurisdiction either of the subject-matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty, and one which is not wholly free from doubt. Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute . Where the process is in due form, and comes from a court of general jurisdiction over the subject matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. Savacool v. Boughton, 5 Wend. 171; Earl v. Camp, 16 Wend. 563; Ela v. Shepard, 32 N. H. 277; Dwinnels v. Boynton, 3 Allen, 310; Chase v. Ingalls, 97 Mass. 524; Bergin v. Hayward, 102 Mass. 414; Chesebro v. Barme, 163 Mass. 79, 82, 39 N. E. 1033; Howard v. Proctor, 7 Gray, 128; Hubbard v. Garfield, 102 Mass. 72; Rawson v. Spencer, 113 Mass. 40; Hines v. Chambers, 29 Minn. 7, 11 N. W. 129; Hann v. Lloyd, 50 N. N. J. Law, 1, 11 Atl. 346. Where, however, the process is void on its face, the officer is not protected. Clark v. Woods, 2 Exch. 395; Pearce v. Atwood, 13 Mass. 324; Eames v. Johnson, 4 Allen, 382; Thurston v. Adams, 41 Me. 419; Harwood v. Siphers, 70 Me. 464; Brown v. Howard, 86 Me. 342, 29 Atl. 1094; Rosen v. Fischel, 44 Conn. 371; Frazier v. Turner, 76 Wis. 562, 45 N. W. 411; Sheldon v. Hill, 33 Mich. 171; Poulk v. Slocum, 3 Blackf. 421. An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is. If, therefore, he does not act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or

there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect. Fisher v. McGirr, 1 Gray, 45; Warren v. Kelley, 80 Me. 512, 15 Atl. 49; (565) Batchelder v. Currier, 45 N. H. 460; Thurston v. Martin, 5 Mason, 499, Fed. Cas. No. 14,018; Campbell v. Sherman, 35 Wis. 103; Summer v. Beeler, 50 Ind. 341; The Marshalsea, 10 Coke, 68b; Crepps v. Durden, Cowp. 640; Brown v. Compton, 8 Term R. 424; Watson v. Bodell, 14 Mees. & W. 57. Whether this doctrine applies to a case like the present, where the court had general jurisdiction over the subject-matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because, on the facts in this case, we are of opinion that the officer may be held liable. He was informed, before making the arrest, that the vessel was a Norwegian vessel, and the captain of the vessel a Norwegian, and that the claim of Johannessen would be adjusted at the consulate of the kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law that the court had no jurisdiction over the person of the captain or the subject-matter of the action. Sprague v. Birchard, 1 Wis. 457, 464, 469; Grace v. Mitchell, 31 Wis. 533, 539, 545; Leachman v. Dougherty, 81 Ill. 324, 327, 328.

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is People v. Warren, 5 Hill, 440. The defendant was indicted for assaulting an officer. The inspectors of an election issued a warrant to a constable for the arrest of the defendant for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election, and that the constable knew it. This was held to be rightly excluded. The opinion is per curiam, and is very brief. While it says that the inspectors had no jurisdiction of the subject-matter, yet the clear meaning is that, if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would, of course, be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes, also, of the case of State v. Weed, 21 N. H. 262. Several cases have been called to our attention in which there are dicta to the effect that an officer is not bound to look beyond his precept, even if

he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defense to the action. See cases above cited. Of course, where the court has jurisdiction of the subject-matter and of the parties to an action, knowledge on the part of the officer or information to him that there is some irregularity in the proceeding can make no difference. Underwood v. Robinson, 106 Mass. 296. Nor can it make any difference that the officer is informed that there is a defense to the action, such as that the defendant has a receipt (Twitchell v. Shaw, 10 Cush. 46); or a discharge in insolvency (Wilmarth v. Burt, 7 Metc. [Mass.] 257); or that the defendant is an infant (Cassier v. Fales, 139 Mass. 461, 1 N. E. 922). But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril. We can see no hardship upon the officer in holding him responsible in this case for an illegal arrest and for a false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an arrest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless. Marsh v. Gold, 2 Pick. 285, 290. We are not aware that this case has ever been doubted, and in practice bonds of indemnity have often been required. In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept, which the court had no jurisdiction to issue, and which it would not have issued, had the facts been before it. We approve of the language of Mr. Freeman in Savacool v. Boughton, 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were wilfully closed to enable him not to see and know that he was too ready an instrument in the perpetration of a grievous wrong." In the opinion of a majority of the court the instruction requested should have been given. Exceptions sustained.

KNOWLTON, J. (dissenting). It seems to me that the opinion of the majority of the court is wrong, in holding that the defendant was bound to receive statements made by the plaintiff or others for

the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court. The exceptions on this point present a naked proposition of law, and raise no question in regard to the good faith of the defendant in performing his official duty. The writ which he served stated an ordinary case for the collection of a debt. An officer is bound to know the law, even to the extent of determining whether a statute on which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the process, nor even to act upon what he believes to be his own knowledge. The jurisdiction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court; but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case. Chase v. Ingalls, 97 Mass. 524; Cassier v. Fales, 139 Mass 461, 1 N. E. 922; Donohoe v. Shed, 8 Metc. (Mass.) 326; Clarke v. May, 2 Gray, 410; Wilmarth v. Burt, 7 Metc. (Mass.) 257; Twitchell v. Shaw, 10 Cush. 46; Underwood v. Robinson, 106 Mass. 296, 297; Rawson v. Spencer, 113 Mass. 40-46; Fisher v. McGirr, 1 Gray, 1-45; State v. Weed, 21 N. H. 262; Batchelder v. Currier, 45 N. H. 460; Watson v. Watson, 9 Conn. 140; Warren v. Kelley, 80 Me. 513-531, 15 Atl. 49; Earl v. Camp, 16 Wend. 562; Webber v. Gay, 24 Wend. 485; People v. Warren, 5 Hill, 440; Hann v. Lloyd, 50 N. J. Law, 1, 11 Atl. 346; Taylor v. Alexander, 6 Ohio, 147; Henline v. Reese, (Ohio Sup.) 44 N. E. 269; Wall v. Trumbull, 16 Mich. 228, 234.

The cases in Wisconsin and Illinois, cited in the opinion, are the only ones that I have been able to find, after considerable investigation, which hold a different doctrine. On the authorities cited above, I am unable to see that it makes any difference whether the outside information communicated to the officer, if taken to be true, would show the real case to be one upon which such a precept cannot properly be issued, because it comes within a treaty giving exclusive jurisdiction to another tribunal, or would show the precept to be unwarranted for any one of numerous other causes. That the defendant in the original action happens to be a captain of a Norwegian ship, and to owe the plaintiff in his official capacity, gives him a privilege

of which he may or may not avail himself, to take the case out of the general jurisdiction of the court. I think this fact calls for the application of the same principle as a strictly personal privilege. Indeed, the principle of the cases seems to cover every kind of external fact which operates to take away a jurisdiction that appears to be perfect on the face of the papers. It has been held that an officer may, if he chooses, act upon his knowledge or information of actual facts which show that the court was without jurisdiction, and refuse to serve the writ. Earl v. Camp, 16, Wend. 562; Henline v. Reese (Ohio Sup.) 44 N. E. 269. But this is very different from requiring him, at his peril, to determine questions of fact. I think the exceptions should be overruled.

THODOROVICH v. FRANZJOSEF, see Von Thodorovich v. Franzjosef Beneficial Association.

THOMPSON v. THE NANNY, (1805, U. S.)
Bee. 217; Fed. Cases 13,984.
Bee, District Court.

[Court refused to take jurisdiction in case between alien seamen and discussed right of jurisdiction of local courts in such cases.—Ed.]

THOMPSON'S SUCCESSION, See Lanfear v. Ritchie.

TINGLE v. TUCKER, (1849, U. S.)
1 Abb. Adm. 519; Fed. Cases 14,057.
Betts, District Court.

(523) BETTS, J. The sufficiency of the action taken by the United States consul at Marseilles to exonerate the respondent from liability for the improper imprisonment of the libellants and for their discharge from the ship, is the main point to be considered and disposed of.

The proceedings before the consul were had at the instance of the respondent; and if any deceit or malpractice had been resorted to by him to induce the official act of the consul, he could not claim any immunity or benefit under that act. There is nothing in the case, however, to show improper conduct or blamable motives on the part of the master in referring the subject to the consul, or that he did not act in the belief that the libellants had commited offences against the laws of the United States, and that the consul had rightful authority to examine into and adjudicate upon the charges, and take order thereon against the seamen.

The consul certifies and returns in full the proofs taken by

him, and states his proceedings to have been had by virtue of section 5 of article 35 of the consular instructions relative to seamen of the United States.

(524) The instructions referred to are not before the court, but they probably have relation to the duties of consuls under the acts of 1803 and 1840.

Section 1 of the act of February 28, 1803, (2 U. S. Stats. 203,) implies the power of a consul to discharge a seaman in a foreign port, and to give a certificate of such act on his part; as by the provisions of the section such certificate of the consular consent to the discharge relieves the master from the penalty imposed for not bringing back to the United States such seaman with the ship.

The act of July 20, 1840, in terms requires the concurrence of the seaman and master in an application to the consul in order to authorize him to discharge the seaman in a foreign port under the provisions of subdivisions 5 and 6 of section 1 of that act. 5 U. S. Stats. 395. The discharge contemplated by those sections is, however, manifestly one from the obligation of the shipping contract, and has no connection with the authority of consuls in repressing criminal offences committed by seamen, or in bringing them to punishment therefor.

Subdivision 11 of section 1 of the same act, (act of July 20, 1840, 5 U. S. Stats. 395,) declares, " it shall be the duty of consuls and commercial agents to reclaim deserters, and discountenance insubordination by every means in their power, and when the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end in the most effectual manner."

It is known to be the familiar practice, in French ports especially, for consuls, upon the representations of masters of vessels, and on a proper substantiation of facts, to obtain the interposition of the local police, which of its own authority, commits seamen to prison because of offences on board of their vessels, or for insubordination of conduct. Cases of this nature have for many years been of frequent occurrence.

It is also a common exercise of authority by American (525) consuls in foreign ports, to send home for trial, in their own ships, or by a different conveyance, seamen accused of crimes committed at sea or in foreign ports. I am not aware that the obligation of shipmasters to bring home such prisoners, or the authority of consuls to transmit them, has ever been directly questioned. Some of our most distinguished admiralty judges have expressed strong doubts as to the power of consuls in these respects; and also, whether, in case seamen are imprisoned abroad or sent home compulsorily by them,

such acts exonerate the master from liability to the men for full wages and damages.

Those cases will be more particularly adverted to in another view of this subject. The question now raised in this cause, it is to be remarked, was not directly presented in those for decision; and the suggestions of the courts, as to the authority of those acts, were accordingly incidental, and in illustration of the general doctrines of the law.

The inquiry in the present case is, whether the consul, upon the facts asserted by him, could lawfully discharge the libellants from the ship, and authorize the master to make up his crew by employing others in their place.

The testimony taken before the consul proves that the conduct and threats of the libellants on board of the vessel were highly mutinous, and that the officers had reasonable grounds for fear for their lives, and had no power to control or restrain the men, at sea.

The testimony of the captain and his wife, taken by the consul, could not be admitted on the trial of the respondent in court, the suit being personally against him for wages. The testimony, also, given by Cooper and Lewis, two of the crew, before the consul, was retracted, or changed in essential features on their examination in this court. Two other persons on board, who were not witnesses before the consul, were examined in court, as were also the libellants each for the others. These proofs rendered the balance of evidence (526) plainly in favor of the libellants against the charge that their acts had been dangerous to the safety of the vessel or her officers. This result of the trial here, does not, however, authorize the conclusion that the case before the consul did not warrant his proceedings, nor but that the hearing in this court, had it been on an indictment before a jury, where the testimony of the master of the vessel and his wife would have been competent, might have led to the conviction of the seamen of the mutinous conduct charged against them. The point, then, is whether the consular act, upon the proofs before him, in detaching these men from the ship, and ordering them home, to be there dealt with under the laws of the United States, on charges for criminal offences committed at sea, fails to bar their right to demand wages to the end of the voyage, because the evidence before the courts on full hearing disproves the necessity or propriety of the consular order. It is to be observed that the decision of the consul is not given merely at the instance and on the representation of the master and respondent. He examined into the charges officially, and decided the course he would adopt upon full hearing of proofs.

Judges Hopkinson and Ware strongly intimate that the act of

a consul in confining or discharging a seaman for criminal misconduct abroad, affords no protection to the master on a demand by the seaman for wages and expenses and damages accruing by his discharge or imprisonment. The Mary, Gilp. 31; The William Harris, Ware, 367.

The force of these suggestions may, perhaps, be regarded as modified by the views expressed by Judge Ware in the more recent case of Smith v. Trent, (4 N. Y. Leg. Obs. 13.) This was a suit brought by the libellant, a seaman on board of the Nimrod, against the master of the vessel, for the recovery of wages. It seems that, by reason of the criminal conduct of the libellant at sea, he was arrested, upon the arrival of the vessel at Point Peter, in the West Indies, and confined in (527) prison, no other civil authority being invoked than that of the American consul at that place. He was subsequently, by order of the consul, sent home in irons to answer to the charges brought against him abroad for such offences.

In relation to that case, the judge says: "As it was, it was certainly the duty of the master to call upon the civil authority of the place, and put the affair in a train of judicial examination. The result of that inquiry was, that Smith was sent home as a prisoner to answer for his conduct to the laws of his country. And from the facts developed on the trial here, it appears to me, that the civil authorities were perfectly justified in this course." 4 N. Y. Leg. Obs. 15, 16.

Although it is not conceded in this decision, that the consul's discharge of the seaman abroad, and issuing a certificate of such discharge, because of his criminal conduct, would bar to the man the recovery of his wages here, yet wages were in fact denied him, because, by his own misconduct, he had disqualified himself from performing the services for which wages were to be paid.

My mind is better satisfied with the more direct and practical principle applicable to the facts. The rightful authority and duty of the consul to interfere and take a seaman from his ship, when his continuance there is dangerous to officers or men, being recognized, (Ware, 16; The Nimrod, 4 N. Y. Leg. Obs. 13,) I think it results that such practical discharge terminates the connection of the seaman with the ship, and disqualifies him from suing the master or ship for after wages of the voyage, and it is quite immaterial whether the judgment of discharge rendered by the consul in this instance, constitutes a bar to the action, if his act legally separated them from the ship and her service.

This of course presupposes that there has been no improper collusion or deceit on the part of the master or owners, and that the

consul has proceeded with integrity and on probable cause in his doings. The consul is personally liable to the (528) party injured, if guilty of any abuse of power, for all damages occasioned thereby. Act of 1840, art. 18; 5 U. S. Stats. 397. I apprehend, however, that the sounder and safer doctrine is, that when on clear *prima facie* proofs he orders a seaman to be discharged from a vessel for criminal conduct threatening the safety of the vessel, or of her officers or company, and transmits him home for trial on the accusations, such discharge is a bar to any continuing claim for wages, that might be enforced if his connection with the vessel still rightfully subsisted.

The propriety of the consul's interference is to be determined upon the facts before him at the time, and not by the case which may be shown afterwards on trial. As in the present instance, displacing part of the testimony legitimately admitted by the consul, and introducing other not heard by him, may give the case a new aspect, and show that the seaman, though debarred of wages *eo nomine* by the act of the consul, may yet resort to the master for damages because of their improper severance from the ship.

Although the evidence before me is irreconcilably conflicting on many points, I consider the preponderance of it to support the demand of the libellants for wages up to the time of their discharge, and that no forfeiture or bar of those wages is established by the respondent.

The expenses incurred by them in Marseilles, by imprisonment or otherwise, were not caused by the master. His application to the consul was that the men should be discharged or taken from the vessel. That was granted. Then the consul, following his own judgment of his duty in furtherance of public justice, had the men committed to prison, and afterwards sent home, as prisoners for trial.

The testimony does not fix upon the defendant any responsibility for these acts, which can be enforced in this form of action.

The decree will be, that the libellants, in these respective (529) causes, recover their several wages up to the time of their discharge at Marseilles, with costs to be taxed; and that the demand for wages to the termination of the home voyage be denied.

Order accordingly.

TOLER v. WHITE, (1834, U. S.)
1 Ware 277; Fed. Cases 14,079.
Ware, District Court.

[Case of suit of consul against master for not depositing ship's papers. Reasons for requiring this deposit.—ED.]

TOPSY, THE, (1890, U. S.—Great Britain)
44 Fed. Rep. 631.
Simonton, District Court.

[Case in which the district court took jurisdiction in spite of consul's protest.—ED.]

TOWNSHEND v. THE MINA, (1868, U. S.)
6 Phila. 482; Fed. Cases 14,121.
Cadwalader, District Court.

A seaman of a British vessel, having submitted his claim to the consul, disregarded the award and filed his libel. The court declined to exercise jurisdiction.

This was a libel for wages by the first mate of the brig Mina. Owing to alleged disobedience of orders, whereby part of the vessel's tackle was lost, the captain claimed to defalk from the wages due to the mate the cost of a hawser, etc. The mate referred the question involved, with the concurrence of the captain, to the decision of the British consul at the port of Philadelphia. The consul investigated and decided the dispute. The mate then disregarded the award by the consul, and filed this libel just before the brig left port. Security was entered through the consul's intervention; the (483) vessel sailed; a proctor was retained to defend the cause, and testimony was taken on both sides. Whereupon, the case having been heard upon the allegations and proofs and arguments of the respective advocates, the following remarks were made by

CADWALADER, J. This was a British vessel. The libellant shipped under articles conformable to the present law of England; but as the voyage was ended on her arrival at this port, he had an option to invoke the jurisdiction of this court, or to ask and submit to the interposition of the British consul. He adopted the latter course; and had the application been rejected by the consul, or improperly acted upon by him, or had the master or owners of the vessel not responded to the libellant's request of consular interposition, I might still, with caution, have entertained the jurisdiction. The case, however, went on, in a friendly way, to a decision of the whole subject in controversy by the British consul. Had this decision been so extravagant as to shock the intelligence of a judicial tribunal in a civilized country, I might have disregarded the award or decision. I say "award or decision," without using the words in a strictly technical sense. The result of this case was the decision of a question of considerable doubt, in part, against the libellant.

The consul appears to have taken great pains; and I have his written statement of the account of the libellant, particularly set

forth, as he adjudicated and settled it. He decided that there was due to him, in the currency of this place, one hundred and three dollars and seventy-six cents, ($103.76) and the money remains in the consulate for him.

It is not for me to decide whether I should have arrived at precisely the same conclusion as the consul did. I am quite sure that he had greater facilities for arriving at a correct knowledge of the facts than I can have. To disregard his decision, would be to establish a precedent which might be very dangerous. It might tempt to much needless and improper litigation, and lead to double dealing on the part of those who, having submitted the decision of similar difficulties to the judgment of a consul, might afterwards, without reason, and for improper motives, claim the jurisdiction of this court.

If the sum of one hundred and three dollars and seventy-six cents ($103.76) is sent within three days to the proctor for libellant, or, in the event of his refusing to accept it, is paid into court, the libel will be dismissed at the cost of the libellant.

This would not be the form of adjudication in a court of common law, where judgment would be given at once for this amount. But I think the judgment of dismissal, after payment, more conformable to the proper method of procedure, in a court of admiralty, where it is unwilling to exercise jurisdiction.

I think it my duty to add that the conduct of the consul, in this case, deserves great commendation, and is in striking contrast with the former course of some other consuls in other parts of the world, who, with captious opposition to courts of maritime jurisdiction, have sometimes raised diplomatic questions as to matters of slight (484) importance, and not in themselves very intricate. Such captiousness may often occasion unjustifiable embarrassments, besides much expense and inconvenience. In this case, the consul in no respect interfered with the libellant's invocation of the subsequent interposition of this court, but merely suggested the improbability that the court would entertain the jurisdiction. The consul appears, very properly, to have employed Mr. Mitcheson as proctor and advocate in the cause, but, in form, as proctor and advocate for the respondent, and not of the consulate.

TRIQUET et al. v. BATH, (1761, Great Britain)
3 Burr. 1478.
Lord Mansfield, In the Court of King's Bench.

(1480) (Extract) I remember in a case before Lord Talbot, of Buvot v. Barbut, upon a motion to discharge the defendant, (who was in (1481) execution for not performing a decree,) "Because he

was the agent of commerce, commissioned by the king of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed.—"Whether a minister could, by any act or acts, waive his privilege."—"Whether being a trader was any objection against allowing privilege to a minister, personally."—"Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister."—"What was the rule of decision: the act of parliament; or, the law of nations." Lord Talbot declared a clear opinion—"That the law of nations, in its full extent, was part of the law of England."—"That the act of parliament was declaratory; and occasioned by a particular incident."—"That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc.; there being no English writer of eminence, upon the subject.

I was counsel in this case; and have a full note of it.

TROOP, THE, (1902, U. S.—Great Britain)
117 Fed. Rep. 557.
Hanford, District Court.

[This case concerns jurisdiction of U. S. courts over foreign ships and seamen similar to that of the Patterson v. Bark Eudora.

Affirmed in Kenney v. Blake, 125 Fed. Rep. 672.—ED.]

TWO FRIENDS, (1799, Great Britain)
1 Rob. C. 217, 271.
Sir William Scott, High Court of Admiralty.

[This case seems to lead to the conclusion that a sailor is considered to be of the nationality of the ship only so far as his duties as a member of the crew are concerned, hence the jurisdiction of a consul over the crew would not exclude the jurisdiction of the local courts in a case foreign to that service and of such a nature as not to materially inconvenience the shipping interests of the consul's country.

p. 284 cites case of the Oester Ems where chests of silver from wreck were deposited with the Prussian consul.—ED.]

UNITED STATES v. BADEAU, (1887, U. S.)
31, Fed. Rep. 697.
Wallace, Circuit Court.

At Law.

(698) WALLACE, J. This suit was brought in the district

court to recover sums of money, amounting in the aggregate to $10,572.64, received by the defendant to the use of the plaintiff between July 1, 1870, and September 16, 1881, as consul general of the United States at London, England. In the final account rendered by the defendant to the government in December, 1882, he credited the government, and charged himself, with certain moneys in his hands, less the sum in controversy; which sum he claimed he was entitled to withhold out of the moneys in his hands, because it represented the amount of fees he had theretofore erroneously charged against himself in former accounts rendered to the government. The issue upon the trial was whether the defendant was entitled to retain these fees, amounting in the aggregate to $10,572.64, as non-official fees, or whether they belonged to the government as official fees. The case for the government was rested upon the production in evidence of a treasury transcript of the account of the defendant. The nature of the items charged to the defendant in this account, comprising the sum in controversy, appears in the treasury transcript, so that upon the fact of the account it was shown that the defendant had charged himself with fees received for specified acts or services, amounting in the aggregate to $10,572.64; and the only question upon the face of the account was whether these acts or services were official or non-official in their character. The case for the defendant was rested upon his own testimony that the items with which he had originally charged himself, comprising the sum in controversy, were moneys received as fees for the acts and services described and detailed in the account, and upon further testimony tending to show the interpretation and construction of the department of state in respect to the regulations prescribing the duties of consular officers.

At the close of the evidence each party requested peremptory instructions to the jury,—the plaintiff, to render a verdict in its favor; and the defendant, to render a verdict in his favor. The court ruled that the defendant erroneously charged himself originally with the items which comprise the sum in controversy, because they consisted of fees received by him for non-official acts. The counsel for the plaintiff then asked to go to the jury upon the question whether the fees were received by the defendant for non-official acts, but the court instructed the jury to find a verdict for the defendant. The plaintiff has brought this writ of error to review these rulings, and other rulings made during the progress of the trial, to which the plaintiff took exceptions.

There is no merit in the exceptions to the rulings of the court in admitting evidence. Even if the testimony received should

be deemed irrelevant, as the case was not submitted to the jury, the jury were not misled.

Neither is there any merit in the exception to the ruling of the court refusing to submit any question of fact to the jury. There was no conflict of evidence as to what the acts were for which the fees in controversy were received by the defendant. Whether they were official or non-official was a question of law. The fees were received by taking (699) affidavits, acknowledgments, and authentications for individuals in transactions which had no relation, directly or remotely, with the official business of the government. As the law was ruled by the court, if the jury had found against the defendant as to any part of the sum in controversy, it would have been the duty of the court to set aside the verdict as against the weight of evidence. The judge, therefore, properly declined to submit any question of fact to the jury.

There was no error in the refusal of the court to permit the amendment of the complaint sought by the plaintiff. The motion was addressed to the discretion of the court. The refusal was also a just exercise of discretion, because the complaint fully set out the facts constituting the cause of action; and an amendment allowing a cause of action for money had and received to be turned into one upon an account stated would have merely tended to introduce technicalities, and would not have promoted justice.

The real question in the case is whether the defendant was entitled to retain the items with which he originally charged himself, or whether these items were for fees received by him officially, and for which he was bound to account to the government. The district judge, in his disposition of this question upon the trial, assigned reasons for his conclusion that the items represented fees for non-official acts which are entirely satisfactory to this court, and it is unnecessary to recapitulate or enlarge upon them. It is proper to say, however, that the position taken by the defendant that the fees were for services not required by consular regulations, but were for services of a non-official character, which were his personal emoluments, and for which he was not required to account to the treasury department, is fully sustained and justified by the interpretation and construction placed by the department of state upon the meaning of its own regulations and instructions to consular officers. The president was authorized by section 1745 of the revised statutes to designate what services of consular officers should "be regarded as official," besides such as are expressly declared by law. The services for which the fees in controversy were charged, if they were official, were so because they had been designated as of that character by the president. The president,

in the exercise of his executive power, under the constitution, acts through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. Wilcox v. Jackson, 13 Pet. 498, 513; U. S. v. Aliason, 16 Pet. 291, 302; Confiscation Cases, 20 Wall. 102, 109; U. S. v. Farden, 99 U. S. 10, 19; Wolsey v. Chapman, 101 U. S. 755, 759.

The regulations of 1870 and 1874 recognize the non-official character of notarial acts, and other acts which a consul may do, "not in his quality of an agent of the federal government, but simply as a citizen of the United States, whose local position and character render him available to his fellow citizens for such services as might have been rendered by private individuals." The interpretation placed upon the regulations by (700) the state department sufficiently appears in the evidence upon the trial. It was the opinion of that department, communicated to consular officers during the time the defendant was in office, and uniformly acted upon by that department, that services like those in controversy were unofficial services. The action of the accounting officers of the treasury department, in disallowing to the defendant the items with which he had erroneously charged himself, seems to have proceeded upon the assumption that they were more competent to determine what acts performed in the state department, by its subordinate officers under its own regulations, are official, and what are non-official, than that department itself. In a difference of opinion upon any such question it is hardly necessary to say that the judgment of the appropriate executive department will generally prevail.

The judgment is affirmed.

UNITED STATES v. BEE, (1893, U. S.)
54 Fed. Rep. 112.
Gilbert, Circuit Court.

[Question relating to time at which consul's salary begins and liability of consul's bondsmen for excess salary paid to consul by error.—ED.]

UNITED STATES v. EATON, (1898, U. S.)
169 U. S. 331; 18 Sup. Ct. Rep. 374.
White, Supreme Court.

Appeal from Court of Claims.

In October, 1890, Sempronius H. Boyd was commissioned as minister resident and consul general of the United States to Siam. He

qualified and proceeded to his post, and was in June, 1892, engaged in the discharge of his official duties. At that time, being seriously ill, Boyd was granted by the president a leave of absence. Before leaving Bangkok, Siam, Boyd, to quote from the findings of fact, "believing his illness would terminate fatally, and being desirous to protect the interests of the government during his absence, and until the then expected arrival from the United States of Robert M. Boyd, whom Sempronius Boyd desired should act as consul general, the latter called to his aid Lewis A. Eaton (now a plaintiff herein, who was then a missionary at Bangkok), and asked him to take charge of the consulate and its archives. Thereupon the following letter, dated June 21, 1892, was written by Boyd:

" 'U. S. Legation and Consulate General.

" 'Bangkok, June 21, 1892.

" 'Krom Luang Devawongsee Varoprokan, Minister for Foreign Affairs—Monsieur le Ministre: It is with exceeding regret to me to be forced to abandon my diplomatic and consular duties at the court of his majesty, with the enjoyment, pleasure, comfort, and genuine friendship so marked and distinguished, which the representative of the United States fully appreciated and imparted to his government.

" 'All the physicians advise me to go soon to a cold climate. The president has wired me to that effect. In 20 or 30 days I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate, and do designate, L. A. Eaton vice consul general until I am able to assume. If not incompatible with public affairs, I beg you to so regard him.

" 'Monsieur le Ministre, I am too weak and feeble to call in person, which I would so much like to have done, and expressed my thanks and that of my government to the foreign office and attachés.

" 'With assurance of my high consideration, I have the honor to be, Monsieur le Ministre,

" 'Your obedient servant.' "

Boyd thereupon administered to Eaton an oath to faithfully discharge the duties of the office of vice consul general, etc. The findings state that Boyd believed he had authority for this action. Robert M. Boyd, who is referred to above, was then in the United States, and, although appointed as vice consul, had not qualified. Sempronius H. Boyd remained in Siam until the 12th day of July, 1892, when he left for the United States; and on his departure he turned over to Eaton, as the representative of the government of the United States, all the archives and property of the legation. Boyd arrived at his home, in the state of Missouri, on August 27, 1892; and although his leave of absence expired October 26, 1892, he did not, on account of

illness, return to his post, but remained at his home, where he died June 22, 1894. Eaton, on the departure of Boyd, was the sole person "in charge of the interests of the government at Bangkok, and performed whatever duties were required there of either a minister resident or a consul general, with the knowledge of the department of state and with that department's approval. The department acknowledged his communications, and acted upon them as communications from a person authorized to perform the duties of minister resident and consul general in the emergency then existing." On "September 2, 1892, Eaton executed (under instructions from the department of state) an official bond, calling himself acting consul general of the United States at Bangkok. This was received at the department of state, and was approved January 3, 1893. Subsequently, under instructions from the department of state, dated January 24, 1893, he executed another bond as vice consul general of the United States at Bangkok, which was approved by the secretary of state April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the department of state, directing him to insert the date of his appointment in the blank space reserved for the date."

On November 2, 1892, the secretary of state wrote Eaton, inclosing him the commission of Robert Boyd, which had been issued in 1891, as vice consul at Siam. In February, 1893, Robert Boyd appeared in Siam; and, in accordance with the instructions of the secretary of state, Eaton introduced him as vice-consul, and on May 18th he qualified, when Eaton's performance of the duties of the office ceased. The findings below say:

"Eaton rendered to the accounting officers of the treasury his account for salary for the entire period of his service,in which he charged and claimed one-half of the salary of $5000 per annum appropriated for said post of minister resident and consul general, from July 12, 1892, to October 26, 1892,—that is, from the departure of the minister to and including the date on which the leave of absence for sixty days (excluding transit time) expired,—and the full salary, at the rate of $5000 per annum, from October 27, 1892, to May 17, 1893, inclusive.

"Eaton also rendered with his salary account a return of all fees collected during the entire period of his service, both fees official and unofficial, uncluding fees notarial and fees and fines received in the United States consular court at Bangkok, amounting in all to $245.41.

"Eaton also rendered to the department of state his account of

disbursements from the contingent fund of the legation and consulate general from July 1, 1892, to April 30, 1893, which was there approved.

"In the settlement of said accounts by the accounting officers of the treasury, the sum of $5.73, expended by Eaton for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

"In the settlement of Eaton's salary accounts by the treasury, the total amount of fees received, to wit, $245.41, was charged to him, and covered into the treasury. The one-half salary from July 12, 1892, to October 26, 1892, amounting to $726.90, was suspended for 'further information,' which was thereafter furnished, but this sum remains unpaid. The full salary from October 27, 1892, to May 17, 1893, amounting to $2,792.35, as approved by the department of state, was allowed and credited. Deducting from this $245.41 leaves in Eaton's favor a balance of $2,546.94, which was certified to his credit by the first comptroller December 4, 1893, no part of which has been paid."

It is inferable from the facts found that the amount of compensation which the accounting officers of the government settled and allowed in favor of Eaton, as above stated, was withheld from him, because of a claim advanced by Sempronius H. Boyd to the entire salary as minister resident and consul general during a part of the time for which a portion of or the whole of the salary had been allowed Eaton. Indeed, on the 16th of June, 1894, Sempronius H. Boyd sued in the court below to recover his full salary as minister resident and consul general from July, 1892, to February 11, 1893. Thereupon, in December, 1894, Eaton commenced his action to recover the sums embraced in the following items:

(A) For notarial or unofficial fees charged to him in the settlement of his salary account by report No. 162,708, as aforesaid, as per exhibit C herewith	$177 41
(B) For the item of salary suspended in the settlement of his accounts for salary by report No. 162,708, as aforesaid, ...	726 90
(C) For the balance of salary found due to claimant by report No. 162,708, as aforesaid, and certified to his credit, ...	2,546 94
(D) For item expended for contingent expenses by claimant, and suspended in the settlement of his account therefor by report No. 162,709, as aforesaid	5 73
	$3,456 98

The court below consolidated the two cases, and, on its finding the facts above recited, rejected the claim of Sempronius H. Boyd,

his widow having been substituted as a party plaintiff on his death, and allowed the full amount of the claim sued for by Eaton. From this judgment the United States alone appeals.

Asst. Atty. Gen. Pradt and Chas. W. Russell, for the United States. John R. Garrison and John C. Chaney, for appellee.

Mr. Justice WHITE, after making the foregoing statement of the case, delivered the opinion of the court.

The errors relied upon to obtain a reversal rest on three contentions: (1) That the appointment of Eaton as acting vice consul was without warrant of law and hence not susceptible of ratification by the state department. (2) Even if the appointment was authorized by law, the statute conferring the power was in violation of the constitution of the United States. (3) Because, even conceding the appointment to have been valid, the court allowed a sum in excess of the amount which the claimant was legally entitled to recover. We will dispose of these contentions in the order stated.

In the third paragraph of section 1674, Rev. St., the following definition is found: "Vice consuls and vice commercial agents shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls general, consuls or commercial agents, when they shall be temporarily absent or relieved from duty." And this definition by congress of the nature of a vice consulship was not changed by the amendment to section 4130 of the revised statutes by the act of February 1, 1876, as the obvious purpose of that act was simply to provide that, where the words "minister," "consul," or "consul general" were generally used , they should be taken also as embracing the subordinate officers who were to represent the principals in case of absence; in other words, that, where a delegation of authority was made to the incumbent of the office, the fact that the name of the principal alone was mentioned should not be considered as excluding the power to exercise such authority by the subordinate and temporary officer, when the lawful occasion for the performance of the duty by him arose. Provision for the appointment and the pay of vice consuls are found in the following sections of the revised statutes:

"Sec. 1695. The president is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice consuls, vice commercial agents, deputy consuls and consular agents, therein, in such manner and under such regulations as he shall deem proper; but no compensation shall be allowed for the services of any such vice consul, or vice commercial agent, beyond nor except out of the allowance made by

law for the principal consular officer in whose place such appointment shall be made. No vice consul, vice commercial agent, deputy consul, or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the president."

"Sec. 1703. Every vice consul and vice commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed, as shall be determined by the president, and the residue, if any, shall be paid to such principal consular officer. * * *"

The consular regulations, promulgated with the approval of the president, contain the rules adopted in execution of the powers expressed in the above provisions. When the appointment in controversy took place, the regulations of 1888 were in force, and in sections 36, 87 and 471 thereof were found the rules governing the appointments of vice consuls and temporary vice consuls, and the manner of their payment. These sections are as follows:

"36. Vice consuls general, deputy consuls general, vice consuls , deputy consuls, vice commercial agents, deputy commercial agents and consular agents are appointed by the secretary of state, usually upon the nomination of the principal consular officer, approved by the consul general (if the nomination relates to a consulate or commercial agency), or if there be no consul general, then by the diplomatic representative. If there be no consul general or diplomatic representative, the nomination should be transmitted directly to the department of state, as should also the nomination for subordinate officers in Mexico, British India, Manitoba and British Columbia. The nomination for vice consul general and deputy consul general must be submitted to the diplomatic representative for approval, if there be one resident in the country. The privilege of making the nomination for the foregoing subordinate officers must not be construed to limit the authority of the secretary of state, as provided by law, to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the interests of the service or other public reasons may be deemed to require it."

"87. In case a vacancy occurs in the offices both of consul and vice consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the department of state. In those countries, however, where there are consuls general, to whom the

nominations of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the diplomatic representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a consulate general, the temporary appointment will be made by the diplomatic representative."

"471. The compensation of a vice consul general, vice consul, or a vice commercial agent is provided for only from that of the principal officer. The rules in respect to his compensation are as follows, viz:

"(1) In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice consular officer acting in his place is entitled to one-half of the compensation of the office from the date of assuming its duties, unless there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice consular officer is entitled to the full compensation of the office.

"(2) If the principal visits the United States on such leave and returns to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the rule will embrace only the time of absence, not exceeding sixty days, together with the time of transit from his post to his residence in the United States."

It is plain that the above sections of the revised statutes confer upon the president full power, in his discretion, to appoint vice consuls and fix their compensation; that they forbid any appointment, except in accordance with the regulations adopted by the president, with a limitation, however, that the compensation of these officers, if appointed, should be solely "out of the allowance made by law for the principal consular officer in whose place such appointment shall be made." The regulations just quoted come clearly within the power thus delegated. The legality of the appointment in question is then first to be determined by ascertaining whether it was authorized by the regulations. Before analyzing the text of the regulations, their general purpose must be borne in mind. The first section referred to (36) lodges the power in the secretary of state in all cases to appoint a vice consul or a vice consul general. The manifest object of the provision was to prevent the continued performance of consular

duties from being interrupted by any temporary cause, such as absence, sickness, or even during an interregnum caused by death and before an incumbent could be appointed. This was secured by the designation in advance of a subordinate and temporary official, who, in the event of the happening of the foregoing conditions, would be present to discharge the duties. Section 87 provided for a condition of affairs not embraced in section 36; that is, for the case where there would arise a temporary inability to perform duty on the part of both the consul and vice consul. The two provisions together secure an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall either the regular incumbent of the office of consul or vice appointee.

In view of the recognition of Eaton by the state department, and the express approval of his bond as vice consul, it would result that, at least from the date of the official action of the secretary of state, he would be entitled to be treated as appointed by that officer, under section 36. But, as the sum of the salary allowed by the court below antedated the approval of the bond, we pretermit this question, and come to consider whether Eaton's designation was within the regulation for emergency appointments provided in section 87.

The first requisite for calling the emergency power into play exacted by this regulation was that there should be a vacancy in the office both of consul general and vice consul. It is clear that the findings establish that there was such "vacancy," within the meaning of the regulation. The fact that the minister resident and consul general had obtained a leave of absence from the president, and was sick and unable to discharge his duties, and that the vice consul previously appointed had not qualified, and was absent from Siam, did not, it is argued, justify an emergency appointment, because these facts did not create a "vacancy," in the narrower sense of that word. But the vacancy to which regulation 87 relates cannot be construed in a technical sense without doing violence to both the letter and spirit of the statute which authorized the regulation, and without destroying the true relation and harmonious operation of the two rules on the subject expressed in sections 36 and 87. That the statute did not contemplate a merely technical vacancy in the office of a consul general, before a vice consul could be appointed, clearly results from the fact that it defines the latter and subordinate officer as one "who shall be substituted temporarily to fill the places of consuls general * * * when they shall be temporarily absent or relieved from duty." The power to make the appointment when the consul general was only temporarily absent of necessity conveyed au-

thority to do so, although there might be no vacancy in the office, but simply an absence of the principal officer. The provision of the statute limiting the pay of the vice consul or temporary officer out of the pay of the principal official, the incumbent, is also susceptible of but one construction; that is, that the temporary officer could be called upon to discharge the duties, even although there was an incumbent, where from absence or other adequate cause he ceased temporarily to perform his duties. Regulation 36, adopted in pursuance of the statute, and providing for the appointment of vice consuls simultaneously or concurrently with the appointment of consuls, and regulating their pay, is as clear on this subject as is the statute. As regulation 87 but adds another safeguard to that created by the general terms of 36, by providing for a contingency not contemplated in 36,—that is, the case of vacancy in both the consular and vice consular offices,—it follows that the word "vacancy," in 87, imports provision for a condition like unto that contemplated by the law, and provided for in 36. Looking at the two regulations together, and taking in view their purpose, it is obvious that the appointment of the temporary officer for which they both provide depended not solely on a technical vacancy, but included a case where there arose a mere absence or inability of the principal and vice officer to discharge the duties of the consular office.

Nor is it true to say that because regulation 87 confers the power to appoint an emergency vice consul general "on the diplomatic representative," therefore Boyd, who was both minister resident and consul general, was without authority to make a temporary appointment to the latter office. The argument by which this proposition is supported is as follows: As Boyd filled both offices, if there was inability to discharge the duties of one, there was also like inability as to the other, and therefore incapacity to designate in one character a temporary officer to fill the duties of the other. The error here lies in assuming that, because an official is temporarily prevented from performing the duties of his office, thereby he becomes without capacity to make an emergency appointment. There is no essential identity between the two conditions, and it was because of their evident distinction that the regulations caused the existence of one condition (the temporary failure to perform duty) to give rise to the other (that is, the birth of the power to make the temporary appointment). It would lead to an absurd conclusion to construe the regulation as meaning that the very circumstance which generated the power to make the appointment had the necessary effect of preventing the coming into being of the power created. If the two offices of minister resident and consul general be treated as distinct and separate func-

tions, although vested in the same natural person, the authority was clearly in the minister to appoint the vice consul general. If, on the other hand, the two functions be considered as indivisible, the like result follows, since the mere fact that the officer had obtained a leave, or was sick and unable to be present in his office and discharge its duties, did not deprive him of the capacity to make a temporary appointment. In its ultimate analysis, the proposition we have just considered substantially maintains that in no case where the duties of the minister resident and consul general are united in the one person can an emergency consul general be designated under section 87. It would follow that in every such case where leave of absence was granted or sickness arose, and there was no vice consul general present, the public interest must inevitably suffer in consequence of the closing of the consular office. But the very purpose of the statute and regulations was to guard against such a contingency. The evil consequences to result from admitting the proposition is conceded, but the result is attributed, not to error in the argument, but to a presumed omission in the regulations, which should, it is urged, be corrected, not by judicial construction, but by an amendment or change in the regulations. The error in the proposition, however, cannot be obscured by assigning the consequences which flow from it to a defect in the regulations, when, if a sound rule of interpretation be applied, the supposed omission does not arise.

The construction rendered necessary by a consideration of the text of the statute and the regulations, by the remedy intended to be afforded, and the evil which it was their purpose to frustrate, is that the power to designate in case of the absence or the temporary inability of the consul general was lodged in a superior officer, if there was such officer in the country where the consul discharged his duty, and, if not, on the happening of the conditions contemplated by the rule, the officer highest in rank was authorized to make the temporary appointment. Doubtless, it was this construction which caused the department of state to recognize Eaton's appointment, and the secretary of state to approve his bond as vice consul general. The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the president, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

The claim that congress was without power to vest in the president the appointment of a subordinate officer called a "vice consul," to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the constitution. Although section 2 of article 2 of the constitution requires

consuls to be appointed by the president "by and with the advice and consent of the senate," the word "consul" therein does not embrace a subordinate and temporary officer like that of vice consul, as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying: "But the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law or in the heads of departments." Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice consuls, and thereby to deprive them of the character of "consuls," in the broader and more permanent sense of that word. A review of the legislation on the subject makes this quite clear. Section 1674, Rev. St., took its source in "An act to regulate the diplomatic and consular systems of the United States," approved August 18, 1856. 11 Stat. 52. While in the earlier periods of the government, officers known as "vice-consuls" were appointed by the president, and confirmed by the senate, the officials thus designated were not subordinate and temporary, but were permanent and in reality principal officials. 7 Op. Attys. Gen. 247; 3 Jefferson's Writings, 188. During the period, however, while the office of vice consul was considered as an independent and separate function, requiring confirmation by the senate, where a vacancy in a consular office arose by death of the incumbent, and the duties were discharged by a person who acted temporarily, without any appointment whatever, it would seem that the practice prevailed of paying such officials as *de facto* officers. In 1832 the department of state submitted to Mr. Attorney General Taney the question of whether the son of a deceased consul, who had remained in the consular office, and discharged its duties, was entitled to the pay of the office. In replying, the attorney general said:

"If, after the death of Mr. Coxe, his son performed the services, and incurred the expenses of a residence there, and his acts have been recognized by the government, I do not perceive why he should not receive the compensation fixed by law for such services. He was the *de facto* consul for the time, and the public received the benefit. * * * The practice of the government sanctions this opinion, as

appears by the papers before me; and in several instances similar to this, since the law of 1810, the salary has been paid. * * * The public interest requires that the duties of the office should be discharged by some one; and where, upon the death of the consul, a person who is in possession of the papers of the consulate enters on the discharge of its duties, and fulfills them to the satisfaction of the government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public; and, if he is so recognized, the law of congress entitles him to his salary." 2 Op. Attys. Gen. 523, 524.

The terms of the law and its construction, in practice for more than 40 years, sustains the theory that a vice consul is a mere subordinate official, and we do not doubt its correctness.

We come, then, to consider the errors assigned as to the amount of the salary. Prior to February 26, 1883, the consular official at Bangkok was of the third class, and his salary was $3,000. At the date mentioned (26 Stat. 324), an appropriation was made for minister, resident and consul general, to Siam, $5,000. It was on this salary, which was reiterated in subsequent appropriations, that the allowance to Eaton was computed by the accounting officer of the treasury, and adjudged by the court below. It is first claimed that as the vice appointment related only to the consul general's office, and not to that of minister resident, there was error in computing the allowance on the basis of the salary of both offices. Although both the statute and the regulations provide for the payment of the vice official from that of the principal officer, and of this fact congress presumably had knowledge, yet in no case for the appropriation for the salary of the minister resident and consul general to Siam has there been an attribution of a portion thereof to one function, and another part to the other. On the contrary, congress has treated the compensation of the two as an indivisible unit. As the duties of the two offices have thus been inseparably blended by congress, and presumably the performance of the function of one office embraced of necessity the discharge of the duties of the other, we do not think the accounting officers erred in treating the salary fixed for the joint service as indivisible, and in not attempting an apportionment, when congress had failed to direct that such division be made, or to furnish the method of making it. Indeed, the finding that Eaton executed all the duties of both offices required of him by the state department, during his temporary tenure, implies that he performed, at the request of the state department, as consul general, all the functions of minister resident. Thus, the facts bring the case directly within Rev. St. § 1738, which provides that a consular officer may exercise diplomatic functions, in the country to which

he is appointed, when there is no officer of the United States empowered to discharge such duties therein, and when the consular officer is "expressly authorized by the president to do so." Conclusive cogency results from these considerations when it is borne in mind that by the treaty between Siam and the United States there was but one diplomatic and consular officer of the United States in Siam, and that by the express terms of one of the later treaties with Siam the words "consul general of the United States," therein used, are defined to include any consular officer of the United States in Siam. 23 Stat. 782, 783.

It is further argued that as the vice consul is required by law (Rev. St. § 1698), before he enters on the execution of his trust, to give bond, there was error in allowing Eaton compensation for a period prior to the approval of his bond by the secretary of state on April 3, 1893. The finding by the court below that Eaton entered on the discharge of his duties when designated, at once communicated with the department of state, and was recognized as consul general, and allowed to perform all the duties of that office, answers this contention. It is settled that statutory provisions of the character of those referred to are directory, and not mandatory. In U. S. v. Bradley, 10 Pet. 343, which was a suit upon a bond given by one Hall as paymaster, it was contended that, as the bond required by the statute to be executed before an appointee could enter upon the duties of the office had not been furnished, Hall was not accountable as paymaster for moneys received by him from the government. The court, however, held otherwise, saying, per Story, J. (Page 364): "The giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster." In U. S. v. Linn, 15 Pet. 313, suit was brought upon an undertaking executed by Linn as receiver of public moneys, with sureties. A contention was advanced like that made in the Bradley case. The undertaking in question was not executed under seal, while the statute required that the appointee should, before entering upon the duties of the office, execute a "bond." In holding the undertaking enforceable as a common-law obligation, and answering the claim that it was not valid for want of a consideration, the court, per Thompson, J., said (page 313): "The emoluments of the office were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment." And in referring approvingly to the decision in the Bradley case, and in re-

iterating the reasoning of the opinion in that case to which we have already alluded, the court said (page 313): "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was given. And, although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law." At page 314 it was also observed that it was not the mere appointment of Linn as receiver that formed the consideration of the instrument sued upon, but the emoluments and benefits resulting therefrom.

It is true, as claimed by counsel for the government, that in the opinion delivered in the subsequent case of U. S. v. Le Baron, 19 How. 77, expressions are found which appear inconsistent with those to which we have just called attention. But the question presented in the Le Baron case was as to the proper construction of the language of a bond which had been given by a government official, subsequent to his permanent appointment as a deputy postmaster, which bond was executed at the time the appointee was performing the duties of the office under a temporary appointment made during a recess of the senate. Suit having been brought for a breach of the condition of the bond, it was contended that the terms of the instrument stipulated only for liability for the proper performance of the duties of the office under the first appointment. It was held, however, that as the statute required the giving of bond before the appointee could enter upon the execution of the duties of the office, it could not be presumed that the bond was intended to relate back to an earlier date than the time of its acceptance, and that its terms should be given a prospective and not a retrospective operation. In the course of the reasoning on this branch of the case, general expressions were used to the effect that the appointee could not act and the bond could not take effect until its approval; and in discussing the further contention that the appointee was not in office under the second appointment at the time the bond took effect, because his commission had not been sent to him, and was not actually transmitted until after the death of the president who had made the appointment, it was observed that the acts required by the statute to be performed by the appointee before he could enter on the possession of the office under his appointment were "conditions precedent to the complete investiture of the office," and that, "when the person has performed the required conditions, his title to enter on the possession of the office is also complete." But this general language must be confined to the precise state of facts with reference to which it was used, and does not warrant the inference that it was intended to overrule the doctrine enun-

ciated in the Bradley and Linn cases, which were not even referred to. Indeed, that this was not supposed to be the deduction proper to be drawn from the reasoning in the Le Baron case is shown by the fact that in the later case of U. S. v. Flanders, 112 U. S. 88, 5 Sup. Ct. 67, the doctrine of the earlier cases was carried to its legitimate result. In the Flanders case the precise question raised in the case at bar was presented and decided. A collector of internal revenue who was required, before entering upon the duties of his office, to give bond, and who was also required to take an oath before becoming entitled to the salary or emoluments of the office, failed to give bond or take the oath until more than two months after he had been allowed to enter upon the duties of the office. In a suit upon the bond, credit was claimed for compensation for services performed during the period preceding the taking of the oath and giving of bond, and the allowance was resisted by the government on the ground that, under the statutory provisions referred to, the right to compensation did not exist. The court, however, held otherwise, saying (page 91, 112 U. S., and page 68, 5 Sup. Ct.):

"If the collector is appointed, and acts and collects the moneys, and pays them over and accounts for them, and the government accepts his services, and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments' of the office.

"But we are of opinion that the statute is satisfied by holding that his title to receive or retain or hold, or appropriate the commission as compensation does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys."

This was evidently the view taken by the state department, since on January 24, 1893, when the bond was returned for re-execution in another form, Eaton was directed to insert therein the date of his original appointment. These considerations dispose of all the questions presented, except the contention that there was error in awarding to Eaton certain items of fees collected, and reported to the treasury, and charged to him, included in which were commissions of $67.91 earned on the settlement of two estates, and the sum of $5.73 disbursed by Eaton for lights upon the birthday of the king of Siam. We need only examine the legality of the two items just mentioned, as the sole objection made to the validity of the others is that Eaton was not en-

titled to charge them, because he was not lawfully acting as consul general.

It is contended that the fees collected for settlement of estates should not be allowed, because the services were "official," and we are referred to paragraph 508, subd. 69, of the consular regulations of 1888, as supporting this claim. On the part of the appellee, however, it is urged that the point has been held otherwise in U. S. v. Mosby, 133 U. S. 273, 10 Sup. Ct. 327, where it is said a similar objection to like charges was decided to be without merit.

It was held in the Mosby case that the court of claims properly allowed to Mosby (who had been consul at Hong Kong from February, 1879, to July, 1885) the sum of $8.21, as "five per cent. commission on the estate of Alice Evans, May, 1881." In disposing of the matter, the court said (page 287, 133 U. S., and page 332, 10 Sup. Ct.) that "this evidently was a fee in the settlement of a private estate, and was properly allowed." It does not distinctly appear whether the fee there considered was controlled by the consular regulations of 1874, or by those of 1881. This is obvious when it is considered that the regulations of 1881 were only promulgated in May of that year. The regulations controlling this case are those of 1888, which in the respect in question are substantially like those of 1881, while fees earned prior to May, 1881, were governed by the regulations of 1874, which differed on the subject from those of 1881. Indeed, this difference between the two was referred to in the Mosby case, where it was said (page 280, 133 U. S., and page 330, 10 Sup. Ct.):

"Paragraph 321 of the regulations of 1874 is as follows: '321. All acts are to be regarded as "official services" when the consul is required to use his seal and title officially, or either of them; and the fees received therefore are to be accounted for to the treasury of the United States.' It is to be observed that this paragraph used the word 'required,' and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them." * * *

Paragraph 489 of the regulations of 1881 read as follows: '489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the treasury of the United States,' except when otherwise expressly stated therein."

In view of the fact that it is not certain when the fees in question in the Mosby case were earned, and of the difference between the consular regulations of 1874 and 1881, we shall not inquire into the correctness of the decision in the Mosby case, as applied to the precise facts there considered, but will examine the question here pre-

sented in the light of the consular regulations of 1888, and as one of first impression.

By section 1745 of the revised statutes, the president is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged by diplomatic and consular officers for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." Section 1709, Id., makes it the "duty" of consuls and vice consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulate.

The fact that the statute makes it the duty of a consul to administer on personal estates gives rise to the clearest implication that fees for such services were official fees, and the regulations on the subject promulgated by the president clearly support this view. Thus, in the tariff of consular fees contained in paragraph 508 of the consular regulations of 1888 it is provided, in item numbered 56, as follows:

"56. For taking into possession the personal estate of any citizen who shall die within the limits of a consulate, inventorying, selling and finally settling and preparing or transmitting, according to law, the balance due thereon, five per cent. on the gross amount of such estate. If part of such estate shall be delivered over before final settlement, two and one-half per cent. to be charged on the part so delivered over as is not in money, and five per cent. on the gross amount of the residue. If among the effects of the deceased are found certificates of foreign stocks, loans, or other property, two and one-half per cent. on the amount thereof. No charge will be made for placing the official seal upon the personal property or effects of such deceased citizen, or for breaking or removing the seals."

And, by paragraph 375 of the same regulations, a consular officer is directed to report to the treasury department fees of this character, and, if he be a salaried officer, to hold the same subject to the order of the department. This decisive provision is, besides, supplemented by paragraph 501 of the regulations, in which it is declared that "all acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees charged and received therefor are to be reported and accounted for to the treasury of the United States, except when otherwise expressly stated therein."

As the statute made it the official duty of a consul to administer upon the estates of American citizens dying within the consular district, and the president, by virtue of the power vested in him, has clearly placed such duties in the category of "official services," and required the fees earned therefor to be accounted for as "official

fees," it is plain that the accounting officer of the treasury properly charged Eaton with the amount of such fees, and that the court of claims erred in its ruling to the contrary.

The ground of objection urged to the allowance by the court of claims of the item of $5.73 is stated in the brief to be that the disbursement "was personal or diplomatic, and wholly foreign to consular business." We are unable, however, to say that the court of claims erred in its finding in respect to this item, as follows: "The petty item for lights upon the king's birthday was approved by the department of state, and appears to be a charge within the discretion of that department. It is therefore allowed."

It follows from the foregoing considerations that the only error committed by the court below was in treating the fees for the settlement of estates as unofficial, when they should have been held to be official. But this does not render it necessary to reverse the judgment in its entirety, but only to modify the same. Rev. St. §701; Ballew v. U. S., 160 U. S. 187, 16 Sup. Ct. 263. This modification will be effected by deducting from the principal sum of $3,456.98, found due by the court of claims, $67.91, being the amount of the fees improperly allowed. The judgment of the court of claims is therefore modified by reducing the amount thereof to $3,389.07, and, as so modified, it is affirmed.[1]

UNITED STATES v. JUDGE LAWRENCE, (1795, U. S.—France)
3 Dall. 42.

Per Curiam, Supreme Court.

A motion was made by the attorney general of the United States (Bradford) for a rule to show cause why a *mandamus* should not be directed to John Lawrence, judge of the district of New York, in order to compel him to issue a warrant, for apprehending Captain Barre, commander of the frigate Le Perdrix, belonging to the French republic.

The case was this: Captain Barre, soon after the dispersion of a French convoy on the American coast, voluntarily abandoned his ship, and became a resident in New York. The vice-consul of the French republic, thereupon, made a demand, in writing, that Judge Lawrence would issue a warrant to apprehend Captain Barre, as a deserter from Le Perdrix, by vir-(43)tue of the 9th article of the consular convention between the United States and France, which is expressed in these words:

"Art. 9. The consuls and vice consuls may cause to be arrested

[1] From 18 Sup. Ct. Rep. 374.

the captains, officers, mariners, sailors, and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country. For which purpose, the said consuls and vice-consuls shall address themselves to the courts, judges, and officers competent, and shall demand the said deserters in writing, proving by an exhibition of the register of the vessel, or ship's roll, that those men were part of the said crews; and on this demand, so proved, (saving, however, where the contrary is proved) the delivery shall not be refused; and there shall be given all aid and assistance to the said consuls and vice-consuls for the search, seizure, and arrest, of the said deserters, who shall even be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back; but if they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause." 2 Vo. 392.

To the vice-consul's demand the judge answered, "that it was, in his opinion, necessary, before a warrant could issue, that the applicant should prove by the register of the ship, or *role d'equipage,* that Captain Barre was, in fact, one of the crew of Le Perdrix." The vice-consul replied, "that the ship's register was not in his possession; but, at the same time, stated various reasons why he should be admitted to produce collateral proof of the fact in question, instead of being obliged to exhibit the ship's register itself; and declared, that in such case, he would give the judge all the proof that could be desired." The judge persevering in his original opinion on the subject, that "the mode of proof mentioned in the 9th article of the convention was the only legitimate one, and that he could not dispense with it;" the vice-consul obtained a copy of the *role d'equipage,* certified by the French vice-consul at Boston, under the consular seal; and transmitted it to the judge, with another demand for a warrant to arrest Captain Barre; contending that this copy was entitled to the same respect as the original instrument, by virtue of the 5th article of the convention, which is in these words:

"Art. 5. The consuls and vice-consuls respectively shall have the exclusive right of receiving in their chancery, or on board of vessels, the declarations and all the other acts, which the captains, masters, crews, passengers, and merchants of their nation may choose to make there, even their testaments and other disposals by last will: and the copies of said acts, duly (44) authenticated by the said consuls, or vice-consuls, under the seal of their consulate, shall receive faith in law, equally as their originals would, in all the tribunals of the domin-

ions of the Most Christian King, and of the United States. They shall also have, and exclusively, in case of the absence of the testamentary executor, administrator, or legal heir, the right to inventory, liquidate and proceed to the sale of the personal estate left by subjects or citizens of their nation, who shall die within the extent of their consulate; they shall proceed therein with the assistance of two merchants of their said nation, or for want of them, of any other at their choice, and shall cause to be deposited in their chancery, the effects and papers of the said estates; and no officer, military, judiciary, or of the police of the country, shall disturb them or interfere therein, in any manner whatsoever; but the said consuls and vice-consuls shall not deliver up the said effects, nor the proceeds thereof, to the lawful heirs, or to their order, till they shall have caused to be paid all debts which the deceased shall have contracted in the country; for which purpose the creditors shall have the right to attach the said effects in their hands, as they might in those of any other individual whatever, and proceed to obtain sale of them till payment of what shall be lawfully due to them. When the debts shall not have been contracted by judgment, deed, or note, the signature whereof shall be known, payment shall not be ordered but on the creditor's giving sufficient surety, resident in the country, to refund the sums he shall have unduly received, principal, interest and costs; which surety nevertheless shall stand duly discharged, after the term of one year in time of peace, and of two in time of war, if the demand in discharge can not be formed before the end of this term against the heirs who shall present themselves. And in order that the heirs may not be unjustly kept out of the effects of the deceased, the consuls and vice-consuls shall notify his death in some one of the gazettes published within their consulate, and they shall retain the said effects in their hands four months to answer all demands which shall be presented; and they shall be bound after this delay to deliver to the persons succeeding thereto, what shall be more than sufficient for the demands which shall have been formed." 2 Vol. 384.

The judge, however, declared that "he did not consider the copy of the register, to be the kind of proof designated by the 9th article of the convention; and that till the proof specified by the express words of the article was exhibited, he could not deem himself authorized to issue a warrant for apprehending Captain Barre."

Under these circumstances, the minister of the French republic applied to the executive of the United States, complaining (45) of the judge's refusal to issue a warrant against Captain Barre, as a manifest departure from the positive provisions of the consular convention; and the present motion was made, in order to obtain the

opinion of the supreme court, upon the subject, for the satisfaction of the minister.

The rule was opposed by Ingersoll and W. Tilgman, who contended, I. That the original register of the vessel, or ship's roll, was the only admissible evidence under the 9th article of the convention; and II. That in the present case the judge has, in fact, given a judgment; and although a *mandamus* will lie to compel the judge of an inferior court, to proceed to give judgment, it will not lie to prescribe what judgment he shall give.

1. The treaty has placed the subject in controversy upon a footing different from the law of nations; for, independent of positive compact, no government will surrender deserters, or fugitives, who make an asylum of its territory. This, then, is a new law introductory of a new remedy; and whenever a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly construed. 1 Wil. 164. 4 Bac. Abr. 647, 651. The 9th article of the consular convention, may, therefore, be considered in a twofold point of view—1st. As to the true construction of the words: and 2d. As to the competency of a copy of the register, or ship's roll, to be received in evidence, by any analogy to the common law rules of evidence.—1st The words of the article are full and express, that the consul shall prove the deserters, whose arrest he demands, to be part of the ship's crew, "by an exhibition of the register of the vessel, or ship's roll." If those, who drew the instrument, and appear throughout to have perfectly understood the import of the words they used, had not intended to fix a specific mode of proof, a specific mode would not have been mentioned in this case; but the kind of evidence would have been left at large, as in the 14th article, where, in another case, proof of citizenship is to be made, "by legal evidence." But, in fact, the ship's roll is the best evidence which the nature of the case admits; and, if any other, is allowed, it must depend upon the mere discretion of the judge. The individuals of the French nation, as well as the Republic, are interested in the construction of the article; since it deprives them of that protection within our territory, to which they would otherwise be entitled; and their interest becomes peculiarly important, when we consider the existing circumstances of the nation. Besides, whatever inconveniency might flow from this strict construction, if it is the genuine, fixed, meaning of the treaty, the court can not change it on that account. 4 Bac. Abr. 652, 10 Mod. 344. The inconveniences, however, are aggravated (46) beyond their real force. The cases contemplated were, obviously, cases of desertion before the vessel left the port, in which it would always be easy to exhibit the register, before a warrant was issued. The act of congress, vesting

this jurisdiction in the district judges, may, indeed, be too restricted, inasmuch as it does not give each district judge a power to issue his warrant in all parts of the United States, by which the necessity of applying to the judge of every district, into which a deserter might escape, and the consequent necessity of exhibiting the original roll on every such application, would be avoided. The inconveniences suggested might therefore be obviated by congress; and even the government of France might introduce a remedy, by directing the original roll in cases of desertion, to be deposited with the consul, and certified copies to be furnished to the captains of the respective ships. But it is contended, that admitting the exhibition of the original roll to be requisite, still it is sufficient to exhibit it before the person is delivered:—it need not be exhibited before the warrant issues to arrest him. This, however, can not be the true construction of the article, upon a fair analysis of its different parts. In the first part the arrest of deserters only is mentioned, "in order to send them back and transport them out of the country;"—then, it is said, "for which purpose (that is, for the purpose of the arrest) the consuls and vice-consuls shall address themselves to the courts, judges, and officers competent, and shall demand the said deserter in writing, proving by an exhibition of the register, or ship's roll, that those men were part of the crew, etc." and the clause of delivery follows, providing, that "on this demand, so proved, the delivery shall not be refused." On what, then, is the judge to ground his warrant, if not on the exhibition of the roll? there is no other proof mentioned in the article; and, certainly, proof of some kind must be made, before the warrant issues. "No warrant shall issue (says the 6th article of the amendment to the federal constitution) but upon probable cause, supported by oath, or affirmation:" And in this case, if previous proof has been made, there is nothing to prevent the warrant's containing a clause of immediate delivery; since the deserter is only to be committed and imprisoned at the instance of the consul.—2d. If, then, an exhibition of the ship's roll is necessary, the second consideration, arising on the construction of the article, is, whether by analogy to the common law rules of evidence, a copy ought to be received, instead of the original. It is a general rule, that the copy of a deed, or other extraneous proof of its contents, can not be given in evidence, unless it is first shown that the original did once exist, and that it had been destroyed or lost, or is in the possession of the adverse party. 1 Ves. 389. Esp. Dig. 780. 782. 10 Co. (47) 92. In the present case, the only requisite of the rule that is satisfied, establishes the existence of the roll; but proves, at the same time, that it has not been lost or destroyed, and that it is (or at least that it was when the warrant was applied for)

in the possession of the consul at Boston. So strictly has the rule been adhered to, that even the acknowledgment of the obligor will not be received as evidence that a bond was executed by him; the subscribing witness must be produced. Doug. 205. 4 Burr. 2275. As to the inference drawn by the consul, from the 5th article of the convention, in support of a copy of the roll as competent evidence, the article clearly relates to matters transacted by consuls in virtue of their specified consular powers, but not to the authentication of foreign instruments, deeds, or commissions.

II. But whatever may be the opinion of this court on the construction of the article in question, they can not interpose by *mandamus*, to compel the district judge to adopt their judgment, instead of his own, as the rule of decision, in a case judicially before him. The supreme court may, it is true, issue writs of *mandamus*, in cases warranted by the principles and usages of law; (1 Vol. p. 58. s. 14.) but there is no usage or principle of law to warrant the issuing of a *mandamus* in a case like the present. By the act of congress (2 Vol. p. 56.) the district judge is appointed the competent judge, for the purpose expressed in the 9th article of the convention; the consul applied to him as such; and the judge refused to issue his warrant, because, in his opinion, the evidence required by the article was not produced. The act of issuing the warrant is judicial, and not ministerial; and the refusal to issue it for want of legal proof, was the exercise of a judicial authority. Where any other court has competent jurisdiction, the court will not interfere by *mandamus* to control it. Esp. Dig. 668. 4 Burr. 2295. In a variety of cases the stress is laid on the act being ministerial, and not judicial. 1 Wils. 125. 283. Esp. Dig. 662. 663. 666. 669. 512. 552. 530. 1 Stra. 113. 392. 1 Vent. 187. T. Raym. 214. 1 Bl. Rep. 640. 3 Bac. Abr. 531. 1 Burr. 131. 4 Com. Dig. 207. 208. Carth. 450. 2 Stra. 835. Sayre's Rep. 160. It is justly said, however, that a writ of *mandamus* ought in all cases to be granted, where the law has provided no specific remedy, though on the principles of justice and good government, there ought to be one. Esp. Dig. 661. 4 Com. Dig. 205. And, it has been generally said, that writs of *mandamus* are either to restore a person deprived of some corporate, or other franchise, or right; or to admit a person legally entitled; 3 Burr. 1267. 2 Burr. 1043. or (upon a more extensive basis) to prevent a failure of justice, to enforce the execution of the common law, and to effectuate some (48) statute; but it has never been allowed as a private remedy for a party, except in cases arising on the 9 Ann. c. 20. Nor has it ever been granted to a person who has exercised a discretionary power. 3 Bac. Abr. 535. 2 Stra. 881. 892. Esp. Dig. 668. 2 T. Rep. 338. Esp. Dig. 668. 2 T. Rep. 338.

Esp. Dig. 667. 3 Bac. Abr. 536. Andr. 183. Thus, the writ was refused, where a visitor has exercised his jurisdiction, and deprived a person of his office in a college: 1 Wils 206. 4 Com. Dig. 209. Andr. 176. Esp. Dig. 667; where commissioners have issued a certificate of bankrupts. 1 Atk. 82. 2, Vez. 250. 1 Cook. Bank. L. 499. And it should be shown that the inferior court had made default, for the superior court will not presume it. Esp. Dig. 670. Bull. N. P. 199. Upon the whole of these authorities it appears, that a *mandamus* is founded on the idea of a default; as where an inferior court will not proceed to judgment, or a ministerial officer will not do an act which he ought to do; but there is no instance of a *mandamus* being issued to a judge, who has proceeded to give judgment according to the best of his abilities. It ought, likewise, to be observed, that where a fact is doubtful, a *mandamus* never issues till it is determined by a jury, either on a feigned issue, or on a traverse to the return under the statute: For, how can this court determine what the material fact of the present case is? And if a *mandamus* is issued, what will be the command?—to receive certain evidence, or, at all events, to issue a warrant for apprehending Captain Barre? If, then, the supreme court take the matter up, in the way proposed, they must examine the proof of Captain Barre's being a deserter; and so make themselves the court competent for this business, contrary to the express meaning and language of the law.

The attorney general, in reply, premised, that the executive of the United States had no inclination to press upon the court, any particular construction of the article on which his motion was founded: but as it is the wish of our government to preserve the purest faith with all nations, the president could not avoid paying the highest respect, and the promptest attention, to the representation of the minister of France, who conceived that the decision of the district judge involved an infraction of the conventional rights of his republic. In construing treaties, neither party can claim an exclusive jurisdiction. If either party supposes that there is in the conduct of the other, a departure from the meaning of a treaty, it is the established course in foreign countries, to apply to the government for immediate redress: and, where that application, for any cause, proves ineffectual, the controversy is referred to a negotiation between the powers at variance. In the present case, however, from the nature of the subject, as well as from (49) the spirit of our political constitution, the judiciary department is called upon to decide; for it is essential to the independence of that department, that judicial mistakes should only be corrected by judicial authority. The president, therefore, introduces the question for the consideration of the court, in order to in-

sure a punctual execution of the laws; and, at the same time, to manifest to the world, the solicitude of our government to preserve its faith, and to cultivate the friendship and respect of other nations.

I. The question is certainly an interesting and important one: but it ought not to be affected by any circumstances respecting the hardship of Captain Barre's fate, or the crisis of French affairs. If Captain Barre suffers any injury, he might, on a *habeas corpus* be relieved; and no change or fluctuations in the interior policy of France, can release the obligation of our government to perform its public engagements. The case must, therefore, be considered as an abstract case, depending on the fair interpretation of an article in a public treaty. This article contemplates, 1st. the arrest of deserters from French vessels in our ports—and, 2d. the delivering of those deserters to the consul, that they may be sent out of the country. The arrest may be made on any kind of proof, the oath of witnesses,[1] the confession of the party, or authenticated papers, showing *prima facie*, that the person against whom the warrant is demanded, belonged to the crew of a French ship. But the delivery is obviously a subsequent act, to be performed after the party has been brought before the judge; when, not only the allegations against him, but his answers and defence, are heard, and the judge has decided that he is an object of the article. Natural justice, and the safety of our citizens, require that such a hearing should take place; and it is, indeed, necessarily implied in those words of the article "saving where the contrary is proved;" which point to a time distinct from that of issuing the warrant, when the party was not present, had not been heard, and could not therefore have proved the contrary, even if such proof were in his power; as by showing that he never signed the ship's roll, or that he had been lawfully discharged. Neither principle nor analogy to other cases, will justify a call for the original roll, merely to (50) bring the party to a hearing, whatever strictness of proof may be exacted to warrant his being delivered. In England the distinction is uniformly recognized: the grounds for issuing a warrant are not strong; for finding an indictment they must be stronger; and for conviction and judgment they are always violent. The construction contended for, in support of the motion, involves no inconveniency; because the judge must receive a reasonable satisfaction before he issues his warrant; and before he delivers the deserter, he may insist

[1] Wilson, Justice. Does it appear that any oath was taken in this case?
Bradford; No: A warrant, which had been issued by the district judge of Pennsylvania—various official letters,—and Captain Barre's own statement, were offered to be produced; but the point was put by the judge on the necessity of producing the original roll, in exclusion of every other species of testimony. This, therefore, is the only question before the court.

on the exhibition of the roll: but the adverse doctrine is attended with the most embarrassing consequences. Suppose a man deserts just as the vessel sails on a distant voyage, must she return to port? According to the maritime regulations, her register must remain on board; and, in such a case, a deserter could never be surrendered. Again:—Suppose a French vessel of war takes a prize, puts a part of her crew on board, and sends the prize to America, while she remains herself at sea: the mariners may desert from the prize with impunity, under the very eye of the minister or consul; as the original roll would continue on board the vessel of war. If there are several prizes sent in, the difficulty is proportionately increased. But all those embarrassments are avoided by a different interpretation of the article:—by allowing the deserters to be arrested, even on a reasonable suspicion, and to be detained 'till proof of their desertion can be procured. The detention, however, could not, under such circumstances, exceed three months, agreeably to the terms of the treaty; and that part of the article seems strongly to presume the vessel to be absent at the time of the arrest, as it provides for his imprisonment until he can be sent out of the country. On the adverse construction, likewise, the article must be deemed to regard as one act, the inspection of the roll, the issuing of the warrant, and the surrender of the deserter; which would operate as a general press warrant, and might become dangerous in the extreme to the liberty of the citizens; for, every man bearing a name enrolled upon the ship's register, would be liable to be arrested and put on board a French vessel, if no hearing took place subsequent to the arrest. Still, however, it is clear, that when the article speaks of a consul's addressing himself to our courts, it is in order to procure assistance "to send the deserters back, and transport them out of the country;" and not merely to obtain an arrest. But the question then arises, whether, even for the purpose of obtaining a delivery of the deserter, there must be an actual production of the register, or ship's roll? Is that the only proof which can be allowed, or is it merely the specification of one mode of proof. without excluding other modes? The article provides for a case in which there shall, peremptorily, be a delivery; but neither (51) in its terms, nor in its nature, does it preclude a delivery in other cases, where the facts are satisfactorily ascertained by other evidence. The inconveniences of that doctrine would be insurmountable. There must be an original roll to produce in every district, into which a deserter could escape. If the roll were burnt, and all the crew desert, nay, if the deserters themselves were to seize upon and destroy the roll, the judge is not only under no obligation to arrest and deliver them, but he is precluded from doing so. Such a construction, so destructive of

the fair advantages of a public compact, ought not to be tolerated. "All civil laws and all contracts in general, (says Rutherford, 2 Inst. B. 2. c. 7. s. 8. p. 327.) are to be so construed as to make them produce no other effect, but what is consistent with reason, or with the law of nature." It is inconsistent with reason, that a provision intended to guard the contracting parties from the inconveniency of the desertion of their mariners, should, in the very mode of expression, defeat itself; and that interpretation, which renders a treaty null and without effect, can not be admitted. Vatt. B. 2. c. 17, s. 283, 287, 290. Nor is the common law without an analogy, competent to obviate the difficulty; for, wherever an original is either a record, or of a public nature, and would be evidence, if produced, an immediate sworn copy will avail. 5 Wood. p. 320. Espinasse. As, in the instance of the Cottonian Collection, whose papers are not allowed to be sent abroad, a copy is always received in evidence; and since a ship's register must, from the nature of the instrument and the rules of the marine, be on board, the reason is, surely, equally cogent, for receiving a copy of it in proof of any judicial inquiry, when the ship is necessarily at a distance. The opposite argument goes, indeed, to exclude stronger testimony than the roll; for a deserter's confession of the fact, before the judge, would not be sufficient to dispense with the production of the instrument itself. The constitutions of the United States and of the state of Pennsylvania, seem to have made no provision (except the former in the case of treason) for a conviction by the confession of the party; yet, the absurdity of proceeding to try a man for a crime, after he has pleaded guilty to the charge, has been too obvious to receive any sanction from the practice of our courts. But that absurdity is urged as law in the present case. Captain Barre had confessed the existence of the roll subscribed by him, and his desertion from the ship, still, it is contended, that the judge must wait for the exhibition of the roll to prove the fact acknowledged;—"to take a bond of fate; and make assurance doubly sure." This, however, would be a mocking of justice—a palpable evasion of the treaty. It is said, that the surrender of deserters is an act odious on principles (52) of humanity, as well as policy; but the remark is not uniformly just. In the case of one army giving encouragement to deserters from another, the surrender would be faithless and iniquitous; but that bears no analogy to the present case; and, in another case, which is analogous to the present, the United States have thought it so reasonable and right, that they have directed any deserter, under contract for a voyage, to be apprehended, and delivered to the captain of the ship—act congress, ch. 29. s. 7. passed 20th July, 1790. But the article of the treaty is affirmative, or directory, and not negative; and the distinc-

tion in construing laws so distinguished could never be more properly enforced. Thus, though the statute of Henry for holding the quarter sessions, prescribes a particular day, the court being held on another day, it was deemed valid. So, where a day was fixed by the act for appointing overseers of the poor, the appointment was good, though made on another day. Upon the whole, the proof given and tendered in this case, was, 1st, the warrant of the district judge of Pennsylvania, which, on common law principles, would be sufficient to procure the indorsement or warrant of any other judge;—2d, the official letters and statement of Captain Barre, proving the fact, as conclusively to every purpose of truth and justice, as the exhibition of his signature to the ship's roll; and being, in effect, a written confession, a species of proof which is admitted even in the case of treason:—and 3d, a copy of the ship's roll certified by the vice-consul. This ought not, perhaps, to be regarded as complete evidence under the 5th article of the convention, which seems only to relate to acts made before, or taken in the presence of, the consul. It is, however, entitled to, at least, as much respect as a notarial certificate, which commands full faith in all commercial countries.

II. If, then, the judge ought not to have refused a warrant for apprehending Captain Barre, this court ought to compel him to grant one, by issuing a *mandamus*. The general principle of issuing that writ, is founded on the necessity of affording a competent remedy for every right; and it constrains all inferior courts to perform their duty, unless they are vested with a discretion. Esp. 3 Burr. 1267. The treaty is the supreme law of the land; and if an absolute discretion is given to the district judge, it is conceded, that this court can not interpose to control and decide it. But much will depend on the nature of the discretion given to the judge; since a legal discretion is sometimes as much implied in the exercise of a ministerial, as in the exercise of a judicial function. In the present case the treaty contemplates an arrest, and a delivery of the deserter: it may, therefore, be considered as one thing(53) to issue the warrant, and as another, very different in nature and jurisdiction, to decide upon a hearing of the parties. In Stra. 881, a *mandamus* was refused, because the granting of a license was discretionary in the justices: but wherever an act of parliament peremptorily directs a thing to be done, though it should be of a judicial nature, if no discretion is vested in the inferior officer or court, a *mandamus* will lie. Thus, the acts of the judge of probates etc. are judicial acts; yet, as the act of parliament declares that administration shall be given to the next of kin, a *mandamus* will issue directing the administration to be granted to the next of kin, and if it appears on the return that A. B. is next of kin, a

mandamus will issue to grant it to him. 1 Stra. 42, 93, 211. If the district judge had returned, that he was of opinion, that Captain Barre was not a deserter, it might have been sufficient; but he has returned that he would not examine the evidence, because it was not evidence. Suppose the ship's roll had been exhibited, and the judge had refused to issue the warrant, because it appeared that Captain Barre had taken the oath of citizenship, would not a *mandamus* issue under such circumstances? 4 Burr. 1991. 2 Stra. 992. But issuing the warrant is merely a ministerial act, and where words are so strongly directory as in the article of the treaty, without any express investment of discretion, a *mandamus* has always been awarded. 1 Wils. 283. 1 Black. Rep. 640. 1 Stra. 553. 113. Doug. 182. Though the commissioners returned, that they had reason to doubt (pursuing the words of the law of Pennsylvania, 2 Vol. Dall. Edit. p. 494) the truth of the bankrupt's conformity, the supreme court at first hesitated, whether a *mandamus* ought not to issue, though it was eventually refused, on the ground of the discretion, which the law gave to the commissioners. But one great ingredient in the exercise of this controling jurisdiction, by *mandamus,* is, that there exists no other specific remedy for the party, and that upon the principles of justice and good government, he ought to have one. 2 Burr. 1045. 3 Burr. 1266, 1659. 4 Burr. 2188. In the present case, the district judge is the only competent judge to issue the warrant; and a writ of error can not be brought merely upon his refusal to institute the process.

By the Court: We are clearly and unanimously of opinion, that a *mandamus* ought not to issue. It is evident, that the district judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre: and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment, but his own. It is (54) unnecessary, however, to declare, or to form, at this time, any conclusive opinion, on the question which has been so much agitated, respecting the evidence required by the 9th article of the consular convention.

The rule discharged.

Cited—5 Pet. 207; 14 Pet. 599; 14 Wall. 166; Id. 603; 11 Otto 700; 3 McArthur 333.

UNITED STATES v. KELLY, (1901, U. S.)
108 Fed. Rep. 538.
Bellinger, District Court.

Prosecution for the obstructing and opposing officers of the

United States in the execution of process. On demurrer to information.

John H. Hall for the United States.

Henry McGinn and C. W. Fulton, for defendants.

BELLINGER, District Judge. This is an information for violation of section 5398 of the revised statutes. The information charges the defendants with having, on the ... day of August, 1900, at the city of Astoria, in this state, knowingly and willfully obstructed and opposed one A. Roberts and one George Maygers, deputy United States marshals for the districts of Oregon, with force and arms, by then and there forcibly taking from the custody of the said deputy marshals one Thomas G. Jefferies, one A. Norbin, one N. Johannson, and one Ole Thomson, who had theretofore, to wit, on the 13th day of August, 1900, at the city of Portland, within the district of Oregon, on a hearing and trial then and there had before Edward N. Deady, United States commissioner within said district, been by said commissioner duly adjudged to be deserters from the ship Cedarbank, a foreign vessel, sailing under the flag of Great Britain; and the said commissioner having duly committed the persons named to the custody of the United States marshal for the district of Oregon, to be by him surrendered and restored to the said ship Cedarbank, under the direction of James Laidlaw, the duly-accredited consul of the kingdom of Great Britain and Ireland at the city of Portland, within the state of Oregon; and the said James Laidlaw, as such consul, having, on the ... day of August, 1900, directed the said United States marshal for the district of Oregon, in writing, to restore the said deserters to the said British ship Cedarbank by delivering them to the master of said vessel, on board thereof, at the city of Astoria; and while the said Jefferies, Norbin, Johannson, and Thomson were still in the lawful custody of the said United States (540) marshals, the said Kelly and Linville, on the ... day of August, aforesaid, did, with force and arms, take said Jefferies, Norbin, Johannson, and Thomson from the custody of said United States marshal, etc. To this information the defendants demur.

The statute under which this information is brought provides that every person who knowingly and willfully obstructs or opposes any officer of the United States in serving or attempting to serve or execute any *mesne* process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, shall be punished. A treaty between the United States and Great Britain, entered into in 1892, provides that the British consul shall have power to require from the proper authority the assistance pro-

vided by law for the apprehension, recovery, and restoration of seamen who may desert from any ship belonging to a citizen of Great Britain. Section 5280 of the revised statutes, in force at the time this treaty with Great Britain was entered into, provides, that:

"On application of a consul or vice-consul of any foreign government having a treaty for the United States stipulating for the restoration of seamen deserting * * * it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government," etc.

The treaty gives to the British consul power to require from the proper authorities the assistance provided by law for the apprehension and restoration of deserting seamen. The only assistance provided by law for this purpose is that provided for by section 5280, above quoted. By that section the proper officer has authority to deliver deserting seamen up to the consul, to be sent back to the dominions of the government to which they belong. In this case it is alleged, in effect, that the commissioner committed the deserting seamen to be surrendered and restored by the marshal to the ship Cedarbank, under the direction of the British consul, and that the consul directed the marshal to restore said seamen to the Cedarbank by delivering them to the master of the vessel, on board thereof, at the city of Astoria, and that while in the execution of said order, the defendants, Kelly and Linville, forcibly took the parties named from the marshal's custody. The commissioner had no authority to direct the restoration of the seamen to the ship Cedarbank. The statute only permits their delivery to the consul. I am satisfied that the commissioner had authority to order the delivery of the deserting seamen to the consul on board the Cedarbank at Astoria, either to the consul himself or to some one authorized to act for him in that behalf. Neither the time when nor the place where the delivery is to be made is specified, and I take it that it might have been made, as I have indicated, at Astoria, or at any other place within the limit of the power of the court to order and of the marshal to execute where such delivery was necessary to be effective. But, from what appears (541) in the information, the deputies were in the execution of an order from James Laidlaw, the British consul, which required them to restore, the seamen to the master of the vessel,—a thing not within the power of the commissioner to order. At the time of the act charged as a crime, the deputies were acting, not in pursuance of such an order as the statute

provides for, but under the direction of the British consul. The officers, therefore, were obstructed, not in the performance of a duty enjoined by law, but in the performance of an act directed by the British consul. The information does not state facts constituting a crime, and the demurrer is sustained.

UNITED STATES v. LUCINARIO, (1906, U. S.—Spain)
6 Philippine Reports 325.
Willard, Supreme Court, Philippine Islands.

(Syllabus) A foreign consul is not a public authority as defined in article 419 of the penal code, but is included within the term dignidad contained in the same article.

[In this case defendant was imprisoned for striking the Spanish consul.—ED.]

UNITED STATES v. LUNT, (1855, U. S.)
1 Sprague 311; Fed. Cases 15,642.
Sprague, District Court.

(Extract) It is proper for the master to take the advice of the consul, as of any other judicious person, but his opinion is only advice, and the responsibility rests with the master.

UNITED STATES v. MITCHELL, (1886, U. S.)
26 Fed. Rep. 607.
Coxe, District Court.

[Payment of consul's salary.

Right to recover payment made to vice-consul for consul's salary.—ED.]

UNITED STATES v. MOSBY, (1889, U. S.)
133 U. S. 273.
Blatchford, Supreme Court.

[Case concerning the consul's right to recover fees claimed to be unofficial and paid into the treasury.

Determination of what constitutes an official fee, which may not be retained by consul.

Fees for care of estate allowed.—ED.]

UNITED STATES v. MOTHERWELL, (1900, U. S.—Russia)
103 Fed. Rep. 198.
McPherson, District Court.

[Decided that art. 9 of the treaty of 1832 with Russia does not

apply and that the prisoner could not be arrested as a deserter upon written request of Russian vice-consul at Philadelphia.—Ed.]

UNITED STATES v. ORTEGA, (1826, U. S.)
11 Wheat. 468.
Washington, Supreme Court.

An indictment under the crimes act of 1790, c. 36, (IX.), s. 27, for infracting the law of nations by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers and consuls," within the 2d section of the 3d article of the constitution of the United States.

The circuit courts have jurisdiction of such an offense under the 11th section of the judiciary act of 1789, c. 20.

***Quaere,* Whether the jurisdiction of the supreme court is not only original, but exclusive of the circuit court, in "cases affecting ambassadors, other public ministers and consuls," within the true construction of the 2d section of the 3d article of the constitution.**

(468) MR. JUSTICE WASHINGTON delivered the opinion of the court:

The defendant, Juan Gualberto de Ortega, was indicted in the circuit court of the United States for the Eastern District of Pennsylvania, for infracting the law of nations, by offering violence to the person of Hilario de Rivas y Salmon, the *chargé d'affaires* of His Catholic Majesty the King of Spain in the United States, contrary to the law of nations, and to the act of the congress of the United States in such case provided. The jury having found a verdict of guilty, the defendant moved an arrest of judgment, and assigned for cause "that the circuit court has not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister." The opinions of the judges of that court upon this point being opposed, the cause comes before this court upon a certificate of such disagreement.

The questions to which the point certified by the court below gives rise, are, first, whether this is a case affecting an ambassador or other public minister, within the meaning of the second section of the third article of the constitution of the United States. If it be, then the next question would be whether the jurisdiction of the supreme court in such cases, is not only original, but exclusive of the circuit courts, under the true construction of the above section and article.

The last question need not be decided in the present case, because the court is clearly of **(469)** opinion that this is not a case affecting a public minister, within the plain meaning of the constitution. It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment

charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States, and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it.

It is ordered to be certified to the circuit court for the eastern district of Pennsylvania, that that court has jurisdiction of the matter charged in the indictment, the case not being one which affects an ambassador or other public minister.

Certificate accordingly.[1]

S. C., 4 Wash. C. C. 531.

Criticised—1 Abb. U. S. 32.

Cited—13 Wall. 594, 595, 600; 3 Blatchf. 265; 4 Blatchf. 51; Taney, 5, 7; 1 Abb. U. S. 32; 4 Wash. 538.

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[1] The constitution of the United States provides (art. 3, sec. 2) that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different (470) states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." And that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

The crimes act of 1790, c. 36 (IX), s. 25, enacts, "That if any writ or process shall at any time be sued forth or prosecuted by any person or persons in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador, or other public minister, of any foreign prince or state, authorized and received as such by the president of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized, or attached, such writ or process shall be deemed and adjudged to be utterly null and void, to all intents and purposes whatsoever (S. 26). That in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors, prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the law of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court." The same section also contains a proviso, excepting from the operation of the preceding sections, any citizen or inhabitant of the United States, who shall have contracted debts before entering into the service of such minister, and requiring the name of such servant to be previously registered in the office of the secretary of state, etc. The 27th section provides, "that if any person shall violate any safe conduct or passport duly obtained, and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court."

The judiciary act of 1789, c. 20, s. 9, provides, "That the (471) district court shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." "And shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid."

The same act (s. 11) provides, that the circuit courts "shall have exclusive cognisance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offenses cognizable therein." It also provides (s. 13) that the supreme court "shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul, or vice-consul, shall be a party."

The question whether the jurisdiction of the supreme court in "all cases affecting ambassadors, other public ministers and consuls" is exclusive as well as original, under the constitution, so as to preclude congress from vesting in any other tribunal jurisdiction over such cases, has never been decided in terms by this court. But it was held, as early as the year 1793, in the circuit court for the district of Pennsylvania, by Wilson and Peters, J. J. (Iredell, J., dissenting), that the jurisdiction in a criminal prosecution against a foreign consul, who was indicted for a misdemeanor at common law, was constitutionally vested in that court, under the 11th section of the judiciary act of 1789, c. 20. The United States v. Ravara, 2 Dall. Rep., 297. It has, however, been expressly determined by this court, that the clause of the constitution giving the supreme court appellate jurisdiction in all other cases than those in which original jurisdiction is granted, does not exclude the court from exercising appellate jurisdiction in cases "arising under the constitution, laws, and treaties of the union," (472) and in "cases of admiralty and maritime jurisdiction," although an ambassador, other public minister or consul, may be a party. If, for example, a foreign minister is sued in a state court by an individual, and that court should take jurisdiction, and give judgment against the minister, the supreme court of the United States may revise the judgment under the appellate powers given to it by the 25th section of the judiciary act of 1789, c. 20. So, where the inferior courts of the union take cognizance, as courts of admiralty and maritime jurisdiction, of suits brought by foreign consuls in maritime causes in which their fellow-citizens are interested, the appellate power of this court has been constantly exercised. (See the judgment of this court in the case of Cohens v. Virginia, *ante*, Vol. VI., pp. 396-401, in which the previous case of Marbury v. Madison (1 Cranch's Rep., 174) is revised and explained.) But where the jurisdiction depends merely upon the character of the consul, and not upon the nature of the case, the question has never been determined by this court, whether congress could invest any other tribunal than the supreme court, with the original jurisdiction.

It has been decided by the supreme court of Pennsylvania, that the state courts have no jurisdiction of any suit brought against a foreign consul or vice-consul. Mannhardt v. Soderstrom, 1 Binn. Rep., 138. There seems to be no reason to doubt the correctness of this adjudication, the constitution giving to the national judiciary cognizance of "all cases affecting consuls," and congress having, by the 9th section of the judiciary act of 1789, c. 20, vested the district courts of the union with jurisdiction of various matters both of a criminal and civil nature, in some of which their jurisdiction is exclusive of the state courts, and, in others, concurrent with them; and towards the latter part of the section, the district courts being vested with jurisdiction "exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid." The word "suits" includes those both of a civil and criminal nature; and the exception of "offenses above the description aforesaid" refers to a description in the first part of the section, viz., offenses where no other punishment than whipping not exceeding thirty stripes, a

fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.

(473) The circuit courts of the union have jurisdiction concurrently with the district courts, of offenses within that description, in cases affecting consuls; and the circuit courts have exclusive jurisdiction of offenses above that description, in cases affecting consuls. It has also been determined by the supreme court of Pennsylvania, that this last jurisdiction of the circuit courts is not only exclusive of the district courts, but of the state courts. Upon this ground, an indictment for a criminal offense under the laws of Pennsylvania, against the Russian consul-general, was quashed for want of jurisdiction by that court, in 1816. Commonwealth v. Kosloff, 5 Serg. & Rawle, 545. In delivering the judgment of the court in that case, Mr. Chief Justice Tilghman also examined the question, as to the nature and extent of the privileges of consuls under the law of nations, and decided that the privilege of immunity from criminal prosecutions was not conferred on them by that law. It had been previously determined by the English court of K. B., in 1814, that they were not privileged as public ministers from arrest in civil cases. Vivian v. Becker, 3 Maul. & Selw., 284. And the authorities, cited from the text-writers on the law of nations in these two cases, show that consuls are in no respect privileged as public ministers.

It results from the above provisions of the constitution, the acts of congress, and the judicial expositions which have been given to them,

1. That no civil suit or criminal prosecution can be commenced against a foreign ambassador, other public minister, or consul, in any state court.

2. That such ambassador, public minister, or consul may, at his election, commence a suit in a state court, (in other respects of competent jurisdiction) against an individual.

3. That an ambassador, or other public minister, cannot be proceeded against in any civil case, by compulsory process, in any court whatever.

4. That a consul may be sued, or proceeded against, civilly or criminally, in the courts of the union, in the same manner as a private individual.

5. That in civil suits against a consul, and in criminal prosecutions against him, within the limits of the criminal jurisdiction of the district courts, the district courts have jurisdiction of such suits or prosecutions.

(474) 6. That in criminal prosecutions against consuls, for offenses above the description of those cognizable in the district courts, the circuit courts have exclusive jurisdiction, and concurrent jurisdiction with the district courts in the other cases cognizable therein.

7. That the supreme court has original and exclusive jurisdiction of such suits or prosecutions against ambassadors, and other public ministers, as any court of justice can exercise consistently with the law of nations.

8. That the supreme court has original, but not exclusive, jurisdiction of suits brought by ambassadors, or other public ministers, or in which a consul is a party.

9. That the supreme court has appellate jurisdiction of all cases, in which a minister or consul is a party, arising in the state courts, and involving the construction of the national constitution, or the validity and construction of the laws and treaties of the union, under the restrictions mentioned in the 25th section of the judiciary act of 1789, c. 20.

10. That the supreme court has appellate jurisdiction of all civil suits brought in the courts of the union, having original jurisdiction of the suit, where a minister or consul is a party, and the matter in dispute exceeds the sum of two thousand dollars.

In criminal cases arising in the courts of the union, no writ of error, or other appellate process, to remove the cause to the supreme court, has been provided by congress; and the only mode in which such cases can be revised in this court is upon a certificate where the opinions of the judges of the circuit court are opposed. United States v. La Vengeance, 3 Dall. Rep. 297; United States v. More, 3 Cranch's Rep., 159; *Ex parte* Kearney, *ante*, Vol. VII., p. 42. Consequently, a criminal case affecting a consul, can only be revised in this court upon a division of opinions of the judges of the court below, certified under the 6th section of the judiciary act of the 29th of April, 1802, c. 291. (XXXI)

The question as to what is the law by which cases affecting ambassadors, other public ministers, and consuls, are to be determined in the courts of the union, in the absence of any legislative provisions by congress applicable to the particular case, would lead into too wide a field of discussion to be embraced by the present

UNITED STATES v. OWEN, (1891, U. S.)
47 Fed. Rep. 797.
Wheeler, District Court.

[Consul not liable for money paid, under the direction of the state department, to a clerk appointed by the president.

Consul entitled to be credited at any time before final settlement, with moneys belonging to himself but paid over under the impression that they were fees.—ED.]

UNITED STATES v. RAVARA, (1793, U. S.—Italy)
2 Dall. 297.
Wilson, Circuit Court.

The defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.

Before the defendant pleaded, his counsel (Heatly, Lewis, and Dallas) moved to quash the indictment, contending that to the supreme court of the United States, belonged the exclusive cognizance of

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note. It is obvious, that the law of nation would, in some (457) instances, form the rule of decision; in others, such as civil causes arising out of contract, and questions of property, the laws of the several states would form the rule; but in what manner the jurisdiction of the national courts is to be exercised in prosecutions against consuls for offenses not declared penal by any act of congress, is a subject on which a great contrariety of opinions has prevailed. In its more general application, this has been stated as a question, whether the United States, as a national government, have any common law, or, in other words, whether the courts of the United States have any common law jurisdiction. In a late essay upon the nature and extent of the jurisdiction of the courts of the United States, Mr. Duponceau has proposed a very elegant and ingenious solution of this problem, by assuming a distinction between the common law as a source of power, and as a means for its exercise. From the common law, considered in the first point of view, he contends that in this country no jurisdiction can arise; while in the second, every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application. He denies its capacity to confer any powers on the courts of the union which they do not possess by the written code of the national government; but he insists that, as a system of jurisprudence, it is the national law of the union, so far as it has not been altered by the constitution, or by acts of congress. Thus, in the case of consuls, it is the constitution which gives the jurisdiction *in personam*, but it is the local law of the state (whether common or statute), which must furnish the rule of decision in the absence of any regulation by congress applicable to cases affecting them. And, in this view, the learned author insists that the 34th section of the judiciary act of 1789, c. 20, making the laws of the several states, except where the constitution, treaties or statutes of the United States, otherwise provide, rules of decision in trials at common law in the courts of the union, in cases where they apply, includes both criminal and civil cases. But the question, for all practical purposes, is settled in this court according to the authority of the case in The United States v. Hudson and Goodwin (7 Cranch's Rep., 32), in which it was determined, that the courts of the union cannot exercise a common law jurisdiction; although it is still considered as open for discussion, whenever a case shall arise rendering it necessary to reconsider that decision. See The United States v. Coolidge, *ante,* Vol. I., p. 415.

the case, on account of the defendant's official character. By the 2d section of the third article of the constitution, it is expressly declared, that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." By declaring in the sequel of the same section "that in all the other cases before-mentioned the supreme court shall have appellate jurisdiction," the word original is rendered tantamount to exclusive, in the specified cases. But surely an original jurisdiction established by the constitution in the supreme court, can not be exclusively vested by law in any inferior courts. The 13th section of the judicial act provides, that "the supreme court shall have exclusively all such jurisdiction of suits or (298) proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party." This provision obviously respects civil suits; but the 11th section declares, that "the circuit court shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." This is a criminal prosecution, not otherwise provided for; and if the jurisdiction can be exclusively vested in the circuit court, it destroys the original jurisdiction given by the constitution to the supreme court. In justice to the legislature, therefore, such a construction must be rejected; and the cognizance of the case be left, upon a constitutional footing, exclusively to the supreme court. The argument is the more cogent from a consideration of the respect which is due to consuls, by the law of nations. Vatt. b. 2. c. 2. s. 34.

Rawle, the district attorney, stated in reply, that there was a material distinction between public ministers, and consuls; the former being entitled to high diplomatic privileges, which the latter, by the law of nations, had no right to claim; and he contended, that the supreme court has original, but not exclusive, jurisdiction of offences committed by consuls: That the district court had jurisdiction (exclusively of the state courts) of all offences committed by consuls, except where the punishment to be inflicted exceeded thirty stripes, a fine of one hundred dollars, or the term of five months imprisonment: And that the circuit court had, in this respect, a concurrent jurisdiction with the supreme court as well as the district court. If indeed this is a crime "cognizable under the authority of the United

States," it is within the express delegation of jurisdiction to the circuit court.

WILSON, Justice. I am of opinion, that although the constitution vests in the supreme court an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established: And as the legislature has expressly declared, that the circuit court shall have "exclusive cognizance of all crimes and offences, cognizable under the authority of the United States, I think the indictment ought to be sustained.

IREDELL, Justice. I do not concur in this opinion, because it appears to me, that for obvious reasons of public policy, the (299) constitution intended to vest an exclusive jurisdiction in the supreme court, upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the constitution seems fairly to justify the interpretation, that the word original, means exclusive, jurisdiction.

PETERS, Justice. As I agree in the opinion expressed by Judge Wilson, for the reasons which he has assigned, it is unnecessary to enter into any detail.

The motion for quashing the indictment was accordingly rejected, and the defendant pleaded not guilty; but his trial was postponed, by consent, 'till the next term.[1]

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[1] The defendant was tried in April session, 1794, before Jay, chief justice, and Peters, justice; and was defended, by the same advocates, on the following points: 1st. That the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States. In England it was once treason; it is now felony; but in both instances it was the effect of positive law. It can only, therefore, be considered as a bare menace of bodily hurt; and, without a consequent inconvenience, it is no injury public or private. 4 Bl. C. 5. 8 Hen. 6. c. 6. 9. Geo. 1. c. 22. 4 Bl. C. 144. 3. Bl. 120. 2d. That considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted. The law of nations is a part of the law of the United States; and the law of nations seem to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. b. 2. c. 2. s. 34. 3d. But, that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for, it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. 2 Hal. H. P. C. 289. 4 Smol. Hist. Eng. p. 382. in note.

Rawle, in reply, insisted that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution agreeably to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required. In support of his arguments he cited the following authorities. 4 Bl. Com. 142. 144. 1 Lev. 146. 1 Keb. 809. 4 Bl. C. 180. Stra. 193. 4 Bl. C. 242. Crown Circ. 376. Fost. 128. Leach 204. 1 Dall. Rep. 338. 1 Sid. 168. Comb. 304. Leach 39. Ld. Ray. 1461. 1 Dall. Rep. 45.

The court were of opinion in the charge, that the offence was indictable, and

UNITED STATES v. TRUMBULL, et al., (1891, U. S.—Chile)
48 Fed. Rep. 94.
Ross, District Court.

[Although consul's government overthrown and new government recognized by receiving state, he must be granted same immunities as long as his *exequatur* is not revoked.

Consul, benefitting from article of French treaty, can not be compelled to appear as witness for prosecution.—ED.]

VALARINO v. THOMPSON, (1853, U. S.—Ecuador)
7 N. Y. 576.
Ruggles, Court of Appeals, New York.

FOREIGN CONSUL.—EXEMPTION FROM SUIT IN STATE COURTS

A foreign consul residing in the United States is not liable to suit in the state courts, though impleaded with a citizen upon a joint contract; nor can his exemption be waived by appearance, not being a personal privilege, but one which exists by virtue of the national judiciary act of 1789. Such exemption may be alleged as an error of fact after judgment, and while the case is in an appellate court.

Action of assumpsit in the superior court of the city of New York, against the defendant and one Mason, commission merchants, doing business in the city of New York, under the firm name of Mason and Thompson. Process was served on the defendant alone, who interposed a defense, but judgment was taken for the plaintiff.

The defendant thereupon removed the cause to the supreme court on writ of error assigning an error in fact that prior to and at the time the action was commenced, and then, he was consul of the republic of Ecuador for the port of New York. The plaintiff alleged in reply that the defendant had voluntarily submitted himself to the jurisdiction of the superior court, and that the cause of action was one in which he was jointly interested with his copartner Mason.

The supreme court reversed the judgment of the superior court, upon which the plaintiff brought this appeal.

(577) J. Larocque, for appellant.
C. O'Conor, for respondent.

RUGGLES, Ch. J. The power of the supreme court to reverse

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that the defendant was not privileged from prosecution, in virtue of his consular appointment.

The jury, after a short consultation, pronounced the defendant, guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and *exequatur.*

As to the question of jurisdiction, see The United States v. Warral, *post.*

the judgment rendered in the superior court of the city of New York for error in fact was not disputed on the argument of this case. Nor was it denied that the United States have exclusive jurisdiction in suits against consuls of foreign states residing here. But it was insisted that the defendant's exemption as a consul from liability to be sued in the state court was his personal privilege; and that he waived it by pleading to the merits and going to trial without raising the objection in the court below. It was also further contended that the United States courts have no jurisdiction in a case like the present, (578) where the consul was sued together with another person on a joint contract, and, therefore, that the suit was rightly brought in the state court.

The points thus raised present questions for the consideration of this court, which, if decided against the defendant, are conclusive in favor of affirming the judgment of the supreme court, and render the examination of the other questions raised on the argument unnecessary.

The exemption of an ambassador or other diplomatic minister from liability to be sued or prosecuted in the courts of the country to which he is accredited is the privilege of his sovereign or government. It is accorded to the office and not to the individual. (Barbuit's Case, Talbot's Cases, 381.) It is founded on the law of nations, and does not depend on the law of the country in which the functions of the minister are to be exercised. The extent of the immunities to which a consul is entitled under the law of nations does not appear to be very clearly defined by writers on public law. According to Vattel, a consul is not entitled to the privileges of a public minister; yet bearing his sovereign's commission, and being in this quality received by the government of the country in which he resides, he is in a certain degree entitled to the protection of the law of nations. The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission would be nugatory and delusive. (Vattel, book 2, chap. 2, sect. 34.) The same writer further says that the functions of a consul seem to require that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned unless he himself violate the law of nations by some enormous crime; and that in such case the respect due to his master requires that he should be sent home to be punished; and that such is the mode pursued by states that are inclined to preserve a good understanding with each other.

Other writers, however, regard a consul as amenable like a private individual to the civil and criminal law of the country (579) to

which he is accredited. (2 Brown's Civ. and Adm. Law, 506; Wicquefort on "The Ambassador," book 1, sect. 5.) In 1793 the Genoese consul was indicted in the circuit court of the United States for the district of Pennsylvania for a misdemeanor, and tried and convicted. In this case the privilege was disallowed or disregarded, but the consul was afterwards pardoned upon condition that he surrendered his commission and *exequator*. (United States v. Ravara, 2 Dallas, 297.)

The privileges of a consul, however, do not always depend on the law of nations. They are frequently regulated by treaty. And by the treaty between the United States and the republic of Ecuador (Art. 29), the consuls of that republic are entitled to all the rights, prerogatives and immunities of the consuls of the most favored nations.

The defendant, therefore, in his consular office, must be regarded as entitled to some rights, prerogatives and immunities under this treaty, if not under the law of nations, and they are of the same nature and character as those to which a public minister is entitled.

An ambassador cannot renounce a privilege accorded to his office by the law of nations, because it is the privilege of his government, and not personally his own. (Barbuit's Case, Talbot's Cases, 281.) The immunities of these public agents are secured to them by public law, in order that they may not be embarrassed in the exercise of their functions by the action of the government of the country where they reside, or of any individual within it. The privileges of the consular office, whether derived from the law of nations or from treaty, stand on the same footing, and for the same reason they cannot be renounced by the officer.

It belongs to the United States courts and not to the courts of this state, to determine what privileges and immunities a foreign minister or consul is entitled to.

The states, by adopting the federal constitution, transferred to the general government the right to exercise a portion of the judicial power which had previously belonged to the several states. The intention was to make the judicial authority of the (580) federal government co-extensive with its political powers. Its judicial powers, therefore, embrace "all cases in law and equity arising under the constitution, the laws of the United States, and all treaties made, or which shall be made, under their authority." (Const., art. 3, sect. 2.) The federal government has charge exclusively of the foreign relations of the country, of the regulation of commerce with foreign nations, and of all political intercourse between this country and others. The federal power of the United States is, therefore, made to extend "to all cases affecting ambassadors, other public ministers and consuls."

(Art. 3, sect. 2.) The judiciary act of 1789 (2 Bioren & Duane's Laws, 56), establishes district courts and defines their authority (sections 2, 3, 9). The latter section gives them jurisdiction "exclusively of the courts of the several states of all suits against consuls and vice consuls," with an exception not affecting the present case.

The defendant, therefore, is exempted, as a consul, from liability to be sued in the state courts. But this exemption is neither his personal privilege nor the privilege of the state by which he was commissioned . It is not founded on the law of nations, or on any treaty between his government and that of this country. If it can be regarded as a privilege belonging to him or to his office, it is only because it secures to him the protection of the national government, which is responsible to his own for any violation of his rights derived under the law of nations or from treaty. But it does not exempt him from liability to respond to his creditors, or to answer for his misconduct. Nobody denies the liability of a consul to be sued in a civil action. The act of congress concedes it, and provides for it. It prescribes the tribunal in which a consul in this country is to be called on to answer, and excludes the state courts from jurisdiction. The object of this exclusion was to keep within the control of the federal government, and subject to the authority of its courts, all cases and controversies which might in any degree affect our foreign relations. The United States government has an interest in maintaining this exclusive jurisdiction, for the purpose of preventing it from being involved in controversies with foreign powers without its consent, and for acts not its own. But this is matter of internal regulation between the general government and the several states, over which foreign governments have no control. The exemption of a consul from liability to be sued in a state court, if it can be called a privilege , is not the privilege of the consul, or of his sovereign, but of the United States government; and, therefore, it cannot be renounced by the consul. In Mannhardt v. Soderstrom (1 Binney, 138), the defendant, who was the Swedish consul, pleaded to the merits of the case, and afterwards moved to quash the proceedings on the ground that the state court had no jurisdiction. The motion was granted, Tilghman, Ch. J., remarking that "the court will put a stop to the proceedings in any stage on its being shown that they have no jurisdiction."

But the case of Davis v. Packard (7 Pet. 276; 8 id. 314), is a direct and conclusive adjudication upon the point we are now considering. That case came before the supreme court of the United States on a writ of error to the court of last resort in this state. Davis, the defendant in that suit, was sued in the supreme court

of this state, on a recognizance of bail entered into by him in a suit of the plaintiff's against T. Hill. He pleaded several pleas to the merits of the case on which issues were joined, and on which a verdict was found and judgment rendered against him. He removed the record by a writ of error to the court for the correction of errors, and then assigned for error in fact that he was consul general of the king of Saxony. This objection had not been raised by plea or otherwise in the court in which he was sued. The defendants in error pleaded in *nullo est erratum*. The judgment of the supreme court was affirmed on the ground, among others, that after having appeared and pleaded to the merits, he could not assign as error in fact that he was such consul, and thereupon allege that the supreme court had no jurisdiction. The case went to the supreme court of the United States on a writ of error. The plaintiffs there raised the objection that Davis, the consul, should have pleaded to the jurisdiction of the state court (582) in the original suit, but the judgment was nevertheless reversed.

The only remaining point to be considered is whether the state courts have jurisdiction in a suit against a consul, where he is sued together with another person on a joint contract. The plaintiff contends that they have , on the ground that the United States courts have not jurisdiction in such a case. But this we think is a mistake. The constitution extends the jurisdiction of the United States courts to all cases "affecting consuls," and the judiciary act makes it exclusive of the state courts "in all suits against consuls." This suit being against a consul is within the terms both of the constitution and of the act, although he sued jointly with another. Whether the 9th section of the act be construed strictly according to its letter, or freely in regard to its object and intention, the result must be the same. Instead of excluding from the jurisdiction of the district court a case in which the consul and another are necessarily co-defendants, it brings the co-defendant within that jurisdiction by unavoidable implication. The intent of the constitution and of the statute cannot be effectually carried out upon any other construction. A consul cannot renounce the exemption from being sued in a state court, because it is not his personal privilege, but the right and privilege of the United States that he should be sued in the federal courts; and for the like reason he cannot avoid the exclusive jurisdiction of those courts by joining in a contract with another person, and thus subjecting himself to a joint suit. It has in some instances been provided by treaty, that when a consul engages in commerce, he shall be subject to the same laws to which private individuals are subject in the same place; as in the treaty between the United States and the

Two Sicilies. But there are exceptions to the general law of nations. The case of Strawbridge v. Curtiss (3 Cranch, 267,) decided under the 11th section of the judiciary act of 1789, is inapplicable to the present case, by analogy or otherwise. The provision in regard to suits against consuls is evidently founded on reasons of public policy which do not exist in cases between citizens of different (583) states, and the jurisdiction of the United States courts is in the one case exclusive and in the other concurrent with that of the state courts. This case has moreover been virtually overruled in reference to suits between citizens of different states. (How. 255.)

Although we cannot look with favor on the conduct of the defendant in taking his chance of success in the supreme court without raising objection to its jurisdiction, and afterwards reversing the judgment on that ground, we think the judgment of the supreme court stands on grounds which cannot be shaken and must be affirmed.

Morse, J., did not hear the argument.

Judgment affirmed.

VAN HOVEN, EX PARTE HENRY, (1876, U. S.—Belgium)
4 Dillon 415.
Dillon, Circuit Court.

[Complaint under oath of consul general of Belgium, although based entirely upon the strength of depositions and telegrams of said foreign state, is sufficient to warrant holding of prisoner.—ED.]

VERGIL, IN RE, (1857, Arbitration between Peru and the United States)
4 Moore Int. Arb. 4,390.

[The mixed commission awarded damages to the heirs of the deceased Peruvian citizen Vergil, because the Peruvian consul was not allowed to act as executor or administrator in accordance with the treaty of July 26, 1851, art. 39.—ED.]

VILLENEUVE v. BARRION, (Given in foot note to Caignet v. Pettit) (1795, U. S.—France)
2 Dall. 235 note; 1 L. Ed. 362.
Per Curiam, Circuit Court.

VIVEASH v BECKER, (1814, Great Britain)
3 Mau. & Sel. 284; 2 Phillim. (2d Ed.) 309.
Lord Ellenborough, Court of King's Bench.

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempted from arrest upon mesne process.

This case was argued on a former day, upon a rule nisi for delivering up the bail bond to be cancelled, by Richardson and Gifford, against the rule, and Scarlett and Campbell in support of it. The question made was, whether the defendant, who had been arrested for a debt of £548 at the suit of the plaintiffs, and compelled to give his bond, was entitled, as consul to the Duke of Sleswick Holstein Oldenburg, to privilege from arrest. On the one side it was contended, upon the authority (285) of Wicquefort (*a*), which it was said is not contradicted by Vattel, that consuls are liable to the justice of the place where they reside, as well in civil as criminal matters. On the other side, the authority of Wicquefort was said not to be supported by the only two instances which he quotes of the Dutch and Venetian consuls, whose arrest appears to have been made the subject of complaint and remonstrance by their respective courts, as being a violance done to the law of nations (*b*). And Wicquefort, in another place (*c*), discoursing of commissioners, who he says are sometimes public ministers, adds, "*C'est ce que se droit aussi entendre des consuls.*" And the authority of Wicquefort may be opposed by that of Vattel, who lays it down (*d*), "that a consul is entitled to the protection of the law of nations;" and again, "that his functions require that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned," etc. A variety of other extracts from the same authors, and several cases were also referred to on each side in the course of the argument, but as the whole is so fully noticed and commented on in the judgment of the court, it is conceived that this short outline of the argument will be sufficient. The court took time to consider.

LORD ELLENBOROUGH, C. J., on this day gave judgment nearly as follows:

This was a rule to show cause why the bail bond should not be delivered up to be cancelled, and in the meantime proceedings staid. This application to the (286) court was founded on the circumstance of the defendant being consul to the Duke of Sleswick Holstein Oldenburg. He grounds his applications upon an affidavit in which he states his appointment as consul. He states that on the 20th of January last the Duke of Oldenburg apopinted him his consul by an instrument under the seal of the duchy in this form: "His Serene Highness the Duke of Sleswick Holstein Oldenburg, reigning Prince of Lubec, etc., having judged proper for the benefit and interest of his subjects to establish a consul and agent for the commercial relations in Eng-

(*a*) Book 1. c. 5. (*b*) *Ibid.* (*c*) *Ibid.*
(*d*) Book 2. c. 2. s. 34.

land, and considering the good testimonies which have been rendered to him of Mr. Charles Christian Becker, merchant, resident in London, has named him the said C. C. Becker as such, and confided to him the said office until revocation, on condition that the said consul shall observe the instructions that shall be given him by the government of Oldenburg, requesting each and every one, according to his rank, title, and dignity, to recognize the said C. C. Becker as consul and agent for the commercial relations of his Serene Highness the Duke of Oldenburg, etc. and to grant him the free exercise of his functions, and to let him enjoy the liberties, immunities and prerogatives attached to such a charge." On this instrument one thing is to be observed, that it is not addressed to the sovereign of the state in which he is to exercise his functions, but only to the public at large; it is a kind of *sciant omnes,* requesting of every one that he may be recognized as consul and agent for commercial relations, and allowed the free exercise of his functions. What those functions are, is in some degree made to appear by what follows. For the affidavit goes on to state, "that he requested the prince regent to grant his permission and approbation for him to take upon himself (287) the said office, and that the Prince Regent was pleased to approve him, signifying such approbation in an instrument, addressed to all his majesty's subjects, and reciting the appointment by the Duke of Oldenburg of C. C. Becker to be his consul in England to assist his subjects and people in their commerce and traffic there;" and it concludes, "We having, thereupon, approved of the said C. C. Becker, as consul aforesaid, our will and pleasure is, and we do hereby require you to receive, countenance, and, as there may be occasion, favorably to assist him the said C. C. Becker in the exercise of his place, giving and allowing unto him all privileges, immunities, and advantages thereunto belonging." This leaves him to the immunities which belong to him as consul, for so the words "thereunto belonging" must be understood. Now what are the functions which he is to exercise? That appears from the instructions which accompany the appointment, and which are stated, 1st, "that he shall endeavor to be useful in all possible ways to the subjects of the Duke of Oldenburg, etc., particularly to sea-faring men, and to render them the necessary succours; particularly (now it specifies) if in time of war any ships with Oldenburg passports should be brought up as prize in any of the ports of England, and should there be detained under any pretext whatsoever, or if the individual subjects of his Serene Highness, who may be on board either in the quality of sailors, or in any other quality whatsoever, should be detained as prisoners of war, the consul shall be bound to render them all the necessary

succours and immediately to make the necessary intercessions or reclamations at the proper tribunals to procure them their liberty. Secondly, he is charged with the same duties in all the other ports of England so long (288) as no consul is established there;" it contemplates, therefore, the possibility of there being a consul in every port. "Thirdly, he is authorized to appoint vice-consuls in all the other ports of England." And this very much relieves the case from the difficulty which was suggested upon the argument; because it appears he might appoint a vice-consul, perhaps even in the port of London. And if that be so, there cannot be any great mischief likely to ensue from his personal restraint; for though he himself may be prevented from exercising his functions, yet if he may delegate those functions, they will continue to be exercised in the same manner as if he was at full liberty. His functions then are purely of a commercial nature, and such as properly belong to a consul, those of advice and intercession; and there is no one function of state purpose to be performed by him as representing the sovereign of his state. This is the instrument from which his functions are to be collected (*a*). He is invested with them *eo nomine* as consul, which makes a distinction between the present and the case before Lord Talbot (*b*); for there he was named only "agent of commerce," which left a difficulty, and made part of the labor of the argument in that case, to ascertain what his functions were; he was not named consul. But it must be recollected that Lord Talbot said, although he was called only an agent of commerce, he did not think that the name altered the case, and that at most he was only a consul. Such are the words of Lord Talbot. Now here (289) he is expressly designated, by name, consul, and nothing more. The affidavit proceeds to state "that the Prince Regent's approbation of his appointment to be consul was notified in the London Gazette on the 12th of March 1814." This carries the case no farther: the instrument which he brings over notifies to every class of persons by the *sciant omnes*, that he is to have the character of consul, and the same is notified in the Gazette. The affidavit then goes on, "that he has ever since exercised the office, that his appointment and powers are still in force, and that the Duke of Oldenburg has during the time had no other minister or diplomatic agent in this country, and that he has during the time acted as a diplomatic agent, and as consul for the duke." It would

(*a*) The instructions contained two other articles, 4thly, "Charging the Oldenburg captains to present themselves before the consul who is to sign their papers, &c. 5th, Every subject of his serene highness who presents himself before the consul, and demands a passport, shall have a right to receive it immediately," &c.

(*b*) Barbuit's case, Cas. temp. Talbot, 281. Cited 3 Burr. 1481.

have been as well if he had stated in what particular function as a diplomatic agent distinct from his function as consul, he ever acted for the duke. The affidavit does indeed go on to state, "that during the time he has by the authority and as representative of the duke, applied for and obtained a large supply of arms and ammunition from the British government for the duke, and that he has been and is in the habit of receiving instructions from the duke to attend to matters totally distinct from commerce for the duke with the British government." But if he was in the habit of receiving instructions for such purposes as these, it would have been material to have shown that he communicated such instructions; but he has not so done, neither does he affect to allege that the government of this country has received him in the character of a person entrusted to make and making such communications. He says, "he has applied for and obtained from the government (290) a large supply of arms and ammunition;" be it so; but we cannot but remember, if we carry our recollection back a little, that at the time to which the affidavit relates, it did not require the intervention of a public functionary to make application for and obtain a large supply of arms and ammunition from this country; I allude to the supply of arms which was afforded by this country for the liberation of Holland. This supply was probably granted upon the application of this person, in the same manner as I dare say it was upon the application of others who had no public functions, for the liberation of Europe from the thraldom under which it lay. In answer to this two affidavits have been filed, the first of which states that the defendant resides in London, and for several years past, and before his appointment of consul carried on and still carries on the business of a merchant in London, and in 1811 became bankrupt, and that the defendant owes debts to the amount of £120,000; that search has been made at the sheriff's office, and that his name is not entered in the lists there as a privileged person; that a consul is not considered as privileged from arrest, and that the sheriff has been in the habit of arresting consuls without any resistance being made. There is another affidavit also stating that application has been made at the secretary of state's office, in order to discover if the defendant's name was registered there as a public minister; and that the deponent was informed that a consul was not considered in that department as a public minister. Thus the question is reduced to this, whether this defendant is entitled to the privilege of immunity from arrest, as belonging to him in his mere character of consul. Every person (291) who is conversant with the history of this country is not ignorant of the occasion which let to the passing of the statute

7 Ann. c. 12. (a) An embassador of the Czar Peter had been arrested, and had put in bail ; and this matter was taken up with considerable inflammation and anger by several of the European courts, and particularly by that potentate. In order to soothe the feelings of these powers the act of parliament was passed, in which it was thought fit to declare the immunities and privileges of embassadors and public ministers from process; and it was enacted, (s. 4.) "that in case any persons should presume to sue forth or prosecute any such writ, or process, such persons, etc. being thereof convicted should be deemed violaters of the laws of nations, and disturbers of the public repose, and should suffer such penalties and corporal punishment as the Lord Chancellor, Lord Keeper, or the Chief Justice of the Queen's Bench or Common Pleas, or any two of them, should judge fit to be inflicted." Thus was conferred a great and extraordinary power, which I am happy to say in no other instance belongs to those persons; but the act of parliament was passed by way of apology, and in order to conciliate the powers offended. It declares also that "all writs and processes that shall in future be sued forth, whereby the person of any embassador or other public minister of any foreign prince or state may be arrested or imprisoned, etc., shall be deemed to be utterly null and void." Here then the question is if this defendant be an embassador or other public minister of a foreign prince or state. He certainly is a person invested with some authority (292) by a foreign prince; but is he a public minister? There is, I believe, not a single writer on the law of nations, nor even of those who have written looser tracts on the same subject, who has pronounced that a consul is *eo nomine* a public minister; and unless he be such he is not within the comprehension of the act of parliament. It has been very truly said that the act is declaratory of the common law, and of the law of nations; and hence it has been argued that he may be entitled to this privilege by the law of nations, though he be not expressly designated in the act. That may be so; although it is not very probable that when the act of parliament was passed for the purpose of laboriously and comprehensively exempting, as far as possible, all persons who stood in any relation to foreign states which would entitle them by the law of nations to be exempted, it should have omitted to designate any description of persons whom it meant to include. Therefore, upon the fair understanding of the statute, the question is, whether he be a public minister. If he be, he is protected by the act, his arrest being in prejudice of the rights and privileges of public ministers. But supposing the defendant to be one of those public func-

(a) See 1 Black. Com. 255.

tionaries who may be entitled to the privileges of the law of nations; how does the case stand upon the usage as it exists under that law? In several books referred to in the course of the argument, and principally in Vattel, b. 2. c. 2. s. 34. "Of consuls," I find it laid down thus: "Among the modern institutions;" (and therefore this institution of consul is not like that of the legatus of old, of whom and of whose rights the Roman history is full, but according to Vattel it is of modern date, and even in more modern times, in Grotius, who (293) is very learned and laborious in his chapter on the subject of legati, the name of consul never occurs; and in Molloy there is not a word about consul; but to proceed with Vattel) "Among the modern institutions for the utility of commerce one of the most useful is that of consuls, or persons residing in the large trading cities, and especially in foreign sea-ports, with a commission empowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have there a person charged with such a commission, and as the state which allows of this commerce must naturally favor it, so for the same reason it is likewise to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul, must procure itself this right by the very treaty of commerce." He goes on, "The consul is no public minister, and cannot pretend to the privileges appertaining to such character. Yet bearing his sovereign's commission, and being in this quality received by the prince in whose dominions he resides, he is in a certain degree entitled to the protection of the law of nations." No doubt he is entitled to the protection of the law of nations, and so is every man who comes into this country from a foreign state under a safe conduct. Vattel proceeds: "The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be insignificant and deceptive. His functions first require that he be not a subject of the state where he resides; as then he would be obliged in all (294) things to conform to its orders, and thus not be at liberty to acquit himself of the duties of his post." What is the case of this defendant? He is not indeed stated to be a natural born subject of this country, but he is shown to be a person owing a temporary allegiance, and it is not negatived that he is a subject born. At any rate it appears that he is a merchant domiciled, and subject to the bankrupt laws. If he has incurred penalties under those laws, shall he be exempted from their operation by being appointed a consul of a foreign prince? Vattel says, "his functions seem to require (and

this is merely argument and it is put as doubtful) that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the laws of nations by some enormous misdemeanor." This certainly may at first seem to import that Vattel considered a consul to be entitled to all the privileges of an embassador. But let us advert to the fourth book of the same author, ch. 6. s. 75. In the sections immediately preceding that section, he has been discussing the different functions of embassadors, envoys, residents, and the last description is that of ministers. He then says in s. 75. "We have spoken of consuls in the article of commerce. (B. 2. c. 2. s. 34.) Formerly agents were a kind of public ministers; but in the present increase and profusion of titles this is given to mere commissioners appointed by princes for their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the law of nations. But a more particular protection is due to them than to other foreigners or citizens, and (295) some regard in consideration of the prince whom they serve." Then he says, "If the prince sends an agent with credentials and for public affairs, the agent from that time becomes a public minister." Then he goes to another subject and discourses of credentials, by which the character of the minister is made known to the sovereign to whom he is sent. It was so positively averred in the argument that Vattel was an authority to show that consuls were under the protection of the law of nations, that I was desirous of consulting him; and the passage to which I have referred shows that it is otherwise. So in another place, B. 4. c. 8. s. 112. he says, "A subject of the state may even in accepting the commission of a foreign prince remain a subject." And he adds that the states general of the United Provinces in 1681 declared, "that no subject of the state should be received as embassador, or minister of another power, but on condition that he should not divest himself of his quality of subject, even with regard to the jurisdiction both in civil and criminal affairs; and that whoever, in making himself known as embassador, or minister, had not mentioned his quality of subject to the state, should not enjoy those rights or privileges, which are peculiar to the ministers of foreign powers." I confess I should be afraid to say that an embassador announced under that name would not be entitled to the privileges belonging to the ministers of foreign powers, except upon the condition in the above declaration. But Vattel proceeds, "Such a minister may likewise retain his former subjection tacitly, and then by a natural consequence drawn from his actions, state, and whole behavior, it is known

that he continues a subject. Thus notwithstanding the declaration above mentioned, (296) those Dutch merchants who procure to themselves the title of residents of some foreign prince, yet continue in trade, thereby sufficiently denote that they remain subjects." Again I should be afraid of adopting a rule that would leave it to the party himself, whether or not he would deprive his sovereign of the benefit resulting from the privileges belonging to his character of minister. However Vattel says, "Whatever inconveniences there may be in the subjection of a minister to the sovereign with whom he resides, if the foreign prince will put up with such inconveniences, and is contented with a minister on that footing, it is his own doing, and should his minister on any ignominious occasion be treated as a subject, he has no cause of complaint." This is peculiarly the case with respect to consuls; for in fact they generally are the subjects of the state to which they are appointed, and in which they reside. A knowledge of the language of the country, and of the forms which exist there, such as will be best found in a subject of the country, is absolutely necessary for the discharge of their functions; and if the sovereign of a foreign state is contented to appoint a subject, he must put up with all the consequences which may attend his being a subject. This is according to what is laid down in Vattel, and therefore it has not been correctly asserted that he is at variance with the other authorities upon the nature of a consul's character. Wicquefort and Barbeyrac are decidedly of the same opinion that a consul is not entitled to the *jus gentium* belonging to embassadors. And in Barbuit's case Lord Talbot said, that as there was no authority for considering the defendant in any other view than as a consul, unless he could be satisfied (297) that those acting in that capacity were entitled to the *jus gentium* he could not discharge him. It appears from a note to that case that the government afterwards settled the matter; and very likely, it was thought convenient to our relations at that time, considering our connection with the sovereign who had appointed the consul, to soothe him by payment of the money. That is the farthest extent to which the argument arising from what was done in that case can be carried; for Lord Talbot seems to have been of opinion that as consul he was not entitled. The case in Burrow (*a*) turned merely on the construction of the clause in the act of parliament respecting the servants of embassadors, and did not involve this question. The case before Lord Talbot is the only one upon the subject. Clarke v. Cretico (*b*) was decided upon the ground of the party being divested of the character of consul at the time of the arrest, but the

(*a*) Triquet v. Bath, 3 Burr. 1478.
(*b*) 1 Taunt. 106.

chief justice seems to have inclined to the opinion that a consul was not privileged. In the absence then of all authority, either of custom or the law of nations, how can we say that a consul is entitled to this privilege? The instances cited from Wicquefort prove the contrary. The dispute between the pope and the republic of Venice is detailed at length in (*c*) Beawes, from which it appears that the violance offered to the consul of that republic by the governor of Ancona, was of such a sort, and done in such a manner as would have entitled any sovereign state under the like circumstances to have made reclamation; their consul was grossly insulted. Nobody is disposed to deny that a consul is entitled to privileges to a certain extent; such (298) as for safe conduct, and if that be violated the sovereign has a right to complain of such violation. This consideration disposes of the authority which was endeavored to be derived from that case. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the act of parliament which mentions only "embassadors and public ministers" and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declatory not only of what the law of nations is, but of the extent to which that law is to be carried. It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges. Thus a consul might appoint a vice consul in every port to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly which the crown could not grant directly. The mischief of this would be enormous. In this case it does not appear that the debt was not contracted before the time of the defendant's having the character of consul. If we saw clearly that the law of nations was in favor of the privilege, it would be afforded to the defendant; and it would be our duty rather to extend than to narrow it. But we are of opinion that no such privilege exists, but that this defendant is like every other merchant liable to arrest.

Rule discharged.

VON THOROROVICH v. FRANZ JOSEF BENEFICIAL ASS'N., (1907, U. S.—Austria-Hungary)

154 Fed. Rep. 911.

Archbald, Circuit Court.

In equity. On motion for preliminary injunction.

(*c*) p. 299. 5th edit.

Adolph Eichholz, for plaintiff.
Henry J. Scott, for defendants.

ARCHBALD, District Judge.[1] This is a bill brought by the imperial and royal consul of Austria-Hungary, located at Philadelphia, to restrain the defendant company, its officers and agents, from making use of the name or portrait of the Emperor Franz Josef, or from representing or doing anything to induce the belief that the business conducted by the company has any official or other relation with such (912) emperor. The company was incorporated in 1887 by the court of common pleas No. 2, of Philadelphia, as a beneficial association, under the general corporation act of the state of Pennsylvania of April 29, 1874 (P. L. 73), which, among other things, allows (section 2) the formation of corporations for "the maintenance of a society for beneficial or protective purposes to its members, from funds collected therein;" and it was subsequently merged with the Panonia Beneficial Association , thereafter apparently losing its identity and ceasing to exist as a separate organization. Within the last year, however, in some way which is not disclosed, the individual defendants, who are its officers, have got hold of the charter and are carrying on a life insurance business under it, soliciting the patronage of persons of German, Hungarian, Polish, and Slavish birth, who have emigrated to the United States from Austria-Hungry, and are subjects of the Emperor Franz Josef; it being represented to them, in that connection, that the association is under his special patronage and has his imperial sanction and concern, of which the use of his name to designate the association, and the adoption of his portrait as a part of the corporate seal, is a direct assurance, according to the customs of the country from which they come. National feeling and loyalty to the emperor are thus played upon to further the business of the association, the deceptive and fradulent character of which, as it is claimed, is evidenced not only by these misstatements, but by others as to its original organization, age, and present financial standing, in line with which the imposing building of the Liverpool, London & Globe Insurance Company, on Walnut street, Philadelphia, where the defendants occupy two small and scantily furnished rooms, is pictured and palmed off as the home office of the association. Feeling that his countrymen are being deceived and cheated and are in need of his assistance and protection, the present bill has been filed, and an injunction is sought by the consul to put an end to these practices.

The right of the consul to intervene in this way is challenged upon several grounds. The whole basis of the bill, as it is said, is the

[1] Specially assigned.

use of the emperor's name, which, except sentimentally, is no concern of the consul; the breach of privacy involved,if any, being a personal matter, which the emperor himself must go about to redress, and not the consul. And against this, moreover, as it is claimed, equity will not relieve even as to an ordinary individual (Robertson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478; Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507), much less one standing in the public eye like the emperor. Corliss v. Walker Co., 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283. But without assenting to all that is so said it is correct to the extent, that, if the use of the emperor's name, in connection with the defendant association, is offensive to the emperor or his subjects, it is not for the consul to remedy it. The Anne, 3 Wheat. (U. S.) 435, 4 L. Ed. 428. But that is not material, not being the basis of the present bill. The consul, in other words, does not come into court in the name or on behalf of the emperor. He is here professedly and distinctly to prevent the misleading and defrauding of his countrymen, and for this he has express sanction. By treaty between the United (913) States and the emperor of Austria ratified June 27, 1871, it was, among other things, provided that:

"Consuls general, consuls, vice-consuls, or consular agents, of the two countries, may in the exercise of their duties, apply to the authorities within their district, whether federal or local, judicial or executive, * * * for the purpose of protecting the rights of their countrymen."

The present suit, therefore, if sustained by the facts, is entirely justified. And as bearing upon this, it may be noted in passing that this court some two years ago entertained a somewhat similar bill under this treaty provision.

That the parties who are in control of the defendant association are making deceptive use of the Emperor Franz Josef's name and portrait, for the purpose of inducing people of Austria-Hungarian nationality to deal with them, is clearly shown by the affidavits, and is not denied. Not only is national sentiment thus appealed to in exploiting the business, which, within proper limits, may not be reprehensible, but direct representation is made that the association is under the particular patronage of the emperor, which is known to be untrue, but to which, according to what is testified, the use of his name and portrait gives credence among these people; neither being admissible by the laws of the country from which they come, except by express imperial consent. This of itself is suggestive of dishonest purposes, but might not, standing alone, be sufficient to lay hold of,

if a legitimate and responsible business was being conducted. But this is not the fact. As a beneficial association, to say no more, the defendants have no right to go into life insurance, which is altogether different. Commonwealth v. National Mutual Aid Association, 94 Pa. 481; Commonwealth v. Equitable Beneficial Association, 137 Pa. 412, 18 Atl. 1112. And while the insurance department of the state may be relied upon to remedy this, when once its attention has been called to it, in the meantime ignorant immigrants are liable to be deceived into investing their money upon expectations, which have little chance, if indeed they ever were intended to be realized. Ignorant of the laws and customs of the land, and coming from a country where they are materially different, they need the assistance of some one upon whom they can rely to take measures such as this to protect them against imposition, and it is for this, among other things, that the treaty evidently provides. If arrested or imprisoned, there can be no question as to the right, as well as the duty, of the consul to intervene in their behalf; and it is but little less important that he should do so where their scanty and hard-got earnings are at stake.

It is true that the association has not failed as yet to fulfill its undertakings, nor, so far as appears, has any complaint with regard to it been made; and in confining the relief sought to restraining the use of the emperor's portrait and name, which only goes to a part of the mischief done, there may be a suspicion that the consul, after all, is more zealous in behalf of his imperial master than those whose cause he professes to espouse. But, starting out, as the association does, and making use of deceptive agencies, as those in charge of its affairs have shown themselves ready and willing to do, the fraud is so mani- (914) fest that it is not necessary to wait until actual injury has been done, which would only afford very imperfect relief. And while the use of the emperor's name is only one of the means employed, and if innocently used there would be no particular ground for complaint, yet it is by far the most important one; and perverted, as it is, and lending itself, as it unfortunately does, in the control of unscrupulous parties, to the serious deception practiced in this case, the only safety is in compelling it to be completely dropped. And if there is occasion for requiring this upon the facts shown, the sentimental motive, if any, of the plaintiff, is of no particular concern. This does not prevent the defendants, as it will be noted, from continuing their business, whatever it may be, provided they do so under another name, which is easily obtained. Nor does it matter that the name which they have was given them by charter. The courts do not hesitate to restrain the use of corporate names, where they are the means of working injury. American Clay Mfg. Co. v. American Clay Mfg. Co., 198 Pa. 189,

47 Atl. 936; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Charles S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Van Houten v. Hooten Cocoa Co. (C. C.) 130 Fed. 600. The way out of it is to amend the name.

And now July 12, 1907, after due hearing, it is ordered and decreed that a preliminary injunction issue, restraining, preventing, and prohibiting the said Franz Josef Beneficial Association, William R. Evans, Julius Bacher, Victor Steinberg, and Samuel Steiner, their agents, representatives, and employés, from employing, using, printing or having printed or impressed, upon any letter heads, cards, certificates or other literature or printed matter, either the name, profile, or portrait of Franz Josef, emperor of Austria, and king of Hungary, and restraining, prohibiting, and enjoining the said Franz Josef Beneficial Association and the other said defendants, their agents, representatives, and employés, from doing any and all things calculated or tending to induce the public to believe that the business conducted by the defendants or the said beneficial association, whose officers and agents they are, has any official or other relation with Franz Josef, emperor of Austria, and king of Hungary, aforesaid.

VROW ANNA CATHARINA, (1803, Great Britain—Portugal)
5 Rob. C. 15.
Sir William Scott, High Court of Admiralty.

[The Dutch consul complained to the Portuguese government that the capture made by British was a violation of neutrality, and the Portuguese consul made the claim in the Prize proceedings.—Ed.]

WAITSHOAIR v. THE CRAIGEND, (1890, U. S.—Great Britain)
42 Fed. Rep. 175.
Hanford, District Court.

[Court takes jurisdiction in a libel suit of British seaman for wages. In the case of The New City, 47 Fed. Rep. 328, same judge declared this was done when there was no protest made by British consul.—Ed.]

WALDRON v. COOMBE, (1810, Great Britain)
3 Taunt. 162.
Sir James Mansfield, Court of Common Pleas.

This was an action brought to recover the loss sustained by the plaintiff, by the deterioration of some kerseymeres on board the

Earl Percy, insured by a policy subscribed by the defendant, "at and from London to Rio Janerio." The plaintiff averred a loss by perils of the sea. The defendant pleaded *non assumpsit,* and paid into court £50 per cent. Upon the trial, at Guildhall, at the sittings in this term, before Mansfield, Ch. J. the plaintiff proved, that, if the goods had not been damaged, the market would have afforded a profit of £15 per cent.; that the goods were damages, apparently by seawater, to a considerable degree; the witness would not have given £30 per cent. for them; but the plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the British vice-consul there, of the amount for which the goods were there sold, being £9 15s. per cent. only, of the sum insured; and the same witness swore, that, by the law of the Brazils, and other parts of South America, the vice consul is constituted general agent for all absent owners of goods, and (163) that the same law authorizes and compels the vice-consul to make sale of all damaged goods of all absentees, with the assistance of two British merchants as assessors. Mansfield, Ch. J. admitted this evidence, although Best, Serjt., for the defendant, objected to it, but reserving to him liberty to move. Best also contended that, as the plaintiff had given no evidence of any loss by perils of the sea, there was no proof of that allegation; in support of which proposition he cited Rucker v. Palsgrave, ante, v. 1. p. 419. for that the payment of money into court did not admit anything more than that the defendant owed £50 per cent. for some cause or other; but Mansfield, Ch. J. held that it admitted that the loss was occasioned, as averred, by peril of the sea, and that the only thing in issue was the amount of the loss: and the jury, under his direction, found a verdict for the plaintiff for £40 4s. damages, with liberty to move to reduce it to £20 the surplus of £70 per cent. after deducting the £50 paid into court, if the court should think the evidence was not admissible.

Best, on a subsequent day, moved for a new trial upon two grounds. First, that the certificate was not admissible evidence. Secondly, that although the defendant admitted damage occasioned by perils of the sea to the amount of £50 per cent. he had gone no further, and that the defendant, if he had not been prevented, would have given evidence at the trial, that other goods, sent by the same vessel, were in no respect damaged, from whence the jury might infer, that all the damage beyond the extent of £50 per cent. was occasioned, not by perils of the sea, but by the improper stowage of the plaintiffs: they had not in fact even proved that there had been a storm, or an hour's foul weather, during the voyage. [Mansfield, Ch. J. The payment of

money into court admits the storms. Lawrence and Heath, justices. No facts are laid before the court, from which we can (164) infer that the defendant could put himself in a better situation if he had the advantage of a new trial] The court granted a rule nisi upon the admissibility of the evidence only.

Shepherd, Serjt., showed cause. He contended, first, that there was a mistake in the verdict, which, instead of giving £70 per cent. damages, should have given £85 damages; for it was proved that the goods were damaged £70 per cent. below the invoice price, and that if they had been uninjured, they would have yielded a profit of £15 per cent. and the loss was to be computed, not on the invoice price, but on the market price of the place at which they had arrived, so that, if the disputed evidence were inadmissible, it would make a difference of £5 per cent. only in the amount of the damages. But supposing the verdict to be now computed upon the right principle, the evidence was sufficient to entitle the plaintiff to his verdict. This sale was compulsory; the vice-consul, as agent of the assured, could not do otherwise than sell the goods. The assured, acting for the benefit of the concern, could get at nothing more than the amount rendered by the vice-consul's account. The law put the sale into the hands of that officer. The loss, therefore, is what the owner sustains, taking this law, and the operation of it, into the account. He could get no more for the goods; therefore the loss is the difference between the sum received, and what the goods were worth when found. The plaintiff's damage is to that extent. Suppose the law had been, that damaged goods should be burnt, although the sea should have only partially damaged them, yet the owner would have had a right to recover the whole value, if in consequence of that partial loss the law interfered and destroyed the whole. This is in the plaintiff's favor, whether the paper be evidence or not that they have received only the proceeds of the sale according to that account. (165) And unless the contrary be shown, it must be taken that they received no more. The defendant should have shown that we did or might have received more. In another point of view the evidence is admissible: the vice-consul at the Brazils may be considered as the agent of all concerned. If so, he is the agent for the underwriters; therefore his account would bind both parties.

MANSFIELD, Ch. J. It was in like manner argued in a case here, Heath v. Burgess, (a) upon the loss of a trinket which cost a very few pounds in the East Indias, that the plaintiff was entitled to calculate the loss at an advance of £70 or £80 per cent. I held that

(a) C. B. Mich. term, 1809, and Hil. term, 1810.

against a carrier, as an insurer, he could only calculate the value of his goods at the invoice price. The case of an insurance was fully agreed upon there.

LAWRENCE, J. Surely it is understood, that when the goods are shipped upon an invoice, the loss is calculated upon that basis; when otherwise, recourse is had to the produce at the market.

MANSFIELD, Ch. J. The only question is, whether this loss should not have been proved by ordinary evidence. They should have had somebody to attend at the sale, who might have been a witness.

Best, Serjt., contra. It does not appear that the law of the Brazils gives effect or authority to the certificate of the vice-consul. Custom-house officers are bound by law to attend clearances, etc., but their certificate does not prove any facts. It does not appear the vice-consul was sworn. There is no instance of such evidence being admitted. Judgments are pronounced in the presence of both parties.

(166) MANSFIELD, Ch. J. I thought at the trial it was very difficult to bring this within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries: but I know of no instances of such as this being received. I dare say it would be evidence in any other country. It came nearest to the case of judgments in foreign courts. But we receive judgments under the seals of the courts. The vice-consul is no judicial officer. He acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government. The vice-consul must preside at the auction. There is no rule in the English law which makes his certificate evidence. He has been supposed to be an agent, and he is, to some purposes. So is an auctioneer in this country; nevertheless his certificate is not evidence in a court of justice, but what was done at the auction must be proved. The business of the vice-consul is to see a fair sale. It is going much farther to say that his certificate shall bind the parties. Anybody present might have proved the facts. The chirograph of fines here proves itself, but the endorsement of the proclamation of the fine must be proved by a compared copy of the record.

Rule absolute to reduce the damages to £70 per cent.

WALTER D. WALLET, THE, (1895, U. S.—Great Britain)
66 Fed. Rep. 1011.
Toulmin, District Court.

(Extract) The British consul does not petition the court to take

jurisdiction of the case; but, on the contrary, requests the court to decline. .....

[So on ground of comity case thrown out.—ED.]

WEDDERBURN, SUCCESSION OF, (1841, U. S.)
1 R. 263.
Garland, Supreme Court of Louisiana.

(Extract) We now take the case upon the petition and evidence, as acted upon by the judge of the court of probates. A copy of the will of Alexander Wedderburn is presented; it is certified by persons stating themselves to hold official capacities, and to be authorized to act in the premises. They show the probate of the will in the prerogative court of the Province of Cantebury, in London, by its records; and the consul of the United States in London, certifies to the official character of these persons and that full faith and credit are due and ought to be given to their acts 'in judicature and thereout.' This certificate is in conformity to the act of the legislature passed in 1837, and is legal evidence of the attributes, official station, and authority of the persons certifying. 1 Bullard & Curry's Digest 822. We do not know in what way these documents can be made more authentic, and the certificates appended to them, show that they would be received as evidence in the courts of Great Britain.

WEIBERG v. THE ST. OLOFF, (1790, U. S.—Sweden)
2 Pet. Ad. 428; Fed. Cases 17,357.
Per Curiam, District Court.

On the 19th of November, 1790, a libel was filed in this court by Mr. Bankson one of the proctors of the court, in behalf of Errick Weiberg and Nicholas Casterius, two mariners belonging to the brig St. Oloff, a Swedish vessel under the command of Jonas Holmstedt.

The complaint states, that the libellants had entered on board this vessel about the 27th day of December in the year 1789, at Cadiz, in the kingdom of Spain, on a voyage from thence to Philadelphia and back again to Cadiz; for the wages of five Spanish milled dollars per month. That the captain had, during the voyage, and since her arrival in this port, treated the libellants with uncommon cruelty, insomuch that it was dangerous for them to remain any longer in his employ; that application had been made in their behalf to Mr. Hellsteadt, the Swedish consul, resident in Philadelphia, who refused to grant them any redress. Whereupon, they pray that their wages may

be paid, and themselves be discharged from any further continuance on board the said brig.

In consequence of this libel, a citation was issued calling upon Jonas Holmstedt and all persons (429) concerned, to appear and make their objections, if any they have, why a decree should not pass according to the prayer of the libellants.

On the morning of the twentieth, the court met according to adjournment, when the marshal made return of the citation, certifying that the same had been duly served. The marshal's deputy at the same time informed the court, that he had first waited on Mr. Hellstead, the Swedish consul resident here, and informed him that he was going to serve the citation upon captain Holmstedt, and showed the copy of the writ; after which he went on board and presented it to the captain, who absolutely refused to receive it, saying, in an angry manner, that he was on Swedish ground: that he then left the citation on the binnacle, and came away.

Soon after this Mr. Hellsteadt the consul came into court, and after making some apology for the captain's behaviour, on account of his not understanding the English language, said, that by the laws of Sweden, the captain is vested with supreme command over his crew, who has a right to punish them according to his own discretion, to any extent, short of murder , or breaking of limbs; and that he neither is, nor can be, answerable to any foreign jurisdiction whatever for the exercise of this power; being accountable to the Swedish courts of judicature alone, on the return of the ship; that it was the captain's duty to refuse obedience to the citation issued from this court, or to do anything that would seem to acknowledge its jurisdiction in a question between him and any of his crew; and that by the treaty between the United States and (430) the court of Sweden, it is stipulated that the subjects of Sweden shall enjoy the same privileges in the ports of the United States that have been or may be granted to the most favored nation in amity with them. Inferring, that as by the convention with France, the French consuls in the ports of the United States have an exclusive jurisdiction in the adjustment of disputes between the captains and their mariners, so ought the regulations and discipline on board of Swedish vessels, to be governed by the Swedish laws and customs, without the interference of the courts of the United States.

The judge said, that he thought that the citation should have been attended to with more respect. However, he would take the objection to the jurisdiction of the court under advisement, and examine the treaties referred to.

Errick Weiberg one of the libellants, then applied to the judge,

suggesting that he was apprehensive of ill-usage if he should remain in the power of the captain. But the judge directed him to continue his duty on board; telling him, that he was under the protection of the court, and believed there was no danger of the captain's using him ill.

As yet no process had issued, except the citation; but as the jurisdiction of the court had been thus expressly denied, the proctor for the libellants moved on the twenty-second to amend his libel, and prayed that process might be awarded and issued against the brig St. Oloff, her tackle, etc., to abide the decree of this court in the cause aforesaid, which was ordered; an amended libel brought (431) forward, and filed, and a writ of attachment issued accordingly.

On the twenty-third, the court being met, the proctor for the libellants complained that, notwithstanding what had been said on Saturday, the captain had seized upon Errick Weiberg, as soon as he came on board from attending on the court, had him put in heavy irons and confined him in the hold of the vessel. Weiberg was then examined, and testified to the cruel treatment he had received, and the irons and chains were brought in and laid before the judge.

On the 24th the Rev. Mr. Collins, the Swedish missionary resident in Philadelphia, appeared in court, and presented a letter signed by Jonas Holmstedt, in which he says, that "although he could not acknowledge the jurisdiction of the court in the cause brought before it by his seamen, as this would be repugnant to the allegiance he owed to the king of Sweden, yet no affront was intended to the court." At the same time another letter was handed to the judge, signed Charles Hellsteadt, Swedish consul, in which he says , that he is responsible in a public line to the king of Sweden; that he had already remonstrated before the court for interfering in the dispute between Captain Holmstedt and two of his seamen. And that he by this letter, protested against any decision that should be made for or against the parties, as the complaint ought to have been made to him, as consul, agreeably to the treaty now in force, between Sweden and North America.

The judge considered the cruel imprisonment of the libellant, whilst suing for justice, and under (432) the protection of the law, as a manifest contempt of the court. He ordered all proceedings respecting the libel to be laid aside, until this contempt should be examined into, and the rights of humanity vindicated, which he said were paramount to all treaties.

The court was thereupon adjourned for an hour to meet at the State House, the court having hitherto sat at the admiralty office. The attorney of the United States for the district of Pennsylvania,

was called upon for his opinion, who attended, together with several gentlemen of the bar, and also some Swedish gentlemen, and others who had heard of the matter.

After examining the testimony with respect to captain Holmstedt's conduct, Mr. Lewis, Mr. Bankson, and Mr. Sergeant, united in opinion, that the treaty with Sweden, as to the point in question, could not be so explained as to give the captain the exclusive jurisdiction he claims. That the words "the most favored nation," used in the treaty with Sweden, are the words used in all the treaties between the United States and foreign nations in amity with them, and were never interpreted to found a jurisdiction exclusive of, or inconsistent with, the laws of the United States in our own ports. That such a right was never pretended in constructions of the general treaty with France; but that for vesting such a jurisdiction, a special convention was thought necessary, the terms of which have been specifically designated, and not left to interferences, or general construction.

That as the captain's conduct, in the instance before the court, could not be supported by his exposition of the treaty, neither could he be justified (433) in refusing obedience to the process of the court. And that this, together with the cruel treatment of the libellant, whilst under the protection of the court, was, and ought to be, deemed a contempt. Adding, however, that some allowance might reasonably be made, in alleviation, for the captain's being unacquainted with the language, and ignorant of the laws and customs of our country.

The judge having attended to these arguments, observed, that the admitting a jurisdiction exclusive of the laws of the United States, was a matter of too serious import to be rested on implication alone. That the words referred to in the treaty with Sweden could not by any construction be supposed to embrace all the objects comprehended in the special convention made with France. That let the question of jurisdiction be what it may, there could be no necessity for the contempt, which captain Holmstedt had thrown upon the court, or of the violence with which the mariner had been treated. That a citation was the most moderate and unexceptionable process known, for bringing a matter before the court; after which, any plea to the jurisdiction might have been discussed, and would have been considered; but that his unprecedented conduct violated not only the rules of law, but even of common decorum. That he could not consistently with his duty, but consider the absolute refusal of answering to the citation, and the subsequent treatment of the libellant, whilst under the protection of the court, as a contempt, which ought not to pass unnoticed. That as to the amount of any fine that might be

laid on this occasion, he was willing to give the apology that had been made its full weight, (434) but that he was firm in asserting the rights and authority of this court in the matter now before it.

JUDGMENT. That Jonas Holmstedt has been guilty of a contempt, in refusing to obey the process of the court, and in confining in irons a suitor whilst under the protection of the laws, and applying for the justice of the country. For which offence I award that he pay a fine of twenty dollars, with the costs of prosecution, and stand committed until this sentence is complied with."

On the 25th, the court met on the business of the libel. Mr. Collin, the Swedish minister, presented a letter to the judge, signed Jonas Holmstedt, in which he says, that he is willing to answer any questions respecting the prosecution of this libel that may be asked, but cannot enter into any defence of his cause, as this would be a violation of the laws of Sweden, which he is, on his allegiance bound to obey. And then quotes a passage from the Swedish maritime law, directing that "if any disputes on the sea or on shore should arise between the captain and his crew, the parties are not permitted to sue for redress in a place subject to a foreign government," etc., etc. But these letters were not noticed, inasmuch as they uniformly expressed a denial of the jurisdiction of the court.

Mr. Soderstrom, the Swedish consul, resident in Boston, being here, addressed the court and said: That he was very sorry he had not sooner heard of this disagreeable business, which he would have endeavored to prevent by all the means in his power. That he could not justify the conduct of captain Holmstedt with respect to contempt, but as judgment had already past, the error was irretrievable: (435) as to the libel now depending, he prayed the judge to indulge him with a little time whilst he endeavored to accommodate matters between the parties, by proposing that the libellants should be discharged from the brig St. Oloff, and put on board some other vessel bound for Sweden, and that the wages due to them should be paid over to him (Mr. Soderstrom), in trust for the mariners, until the dispute might be determined in Sweden by a court of that country. The judge approving of this proposal, the court adjourned till further notice.

On the 27th, Mr. Bankson received a letter from the Rev. Mr. Collin, informing that the proposed accommodation had proved unsuccessful, as consul Hellsteadt, "after the unlimited protest he had before made, could not permit the seamen to be received on board of any other vessel."

The cause then proceeded in course; the witnesses were examined, and the testimony reduced to writing.

On the 29th, a further progress was made in the cause, and some points of form adjusted.

And on the 30th, after proclamation made, the judge gave his final decree, in these words:—

I have duly considered the libel filed in this cause, and have heard and carefully attended to the testimony of the witnesses produced respecting the same; and I find, that the libellants entered on board the brig St. Oloff, Jonas Holmstedt, master, in December 1789, in the port of Cadiz, in the kingdom of Spain; that no articles or written contract (436) whatever were presented to the libellants by the captain, or any other person, to engage them in the service of this vessel, or for any designated voyage, except that they were told by the captain that they were going to Philadelphia and back again to Cadiz, where they should be paid off, at the rate of five dollars per month, and there discharged. That after their arrival at Philadelphia, the captain, without any new agreement whatever, undertook another voyage to St. Andero in Spain and back again to the port of Philadelphia, with the libellants on board, where the vessel now is. It also appears that captain Holmstedt had treated the libellants with uncommon severity and cruelty, especially Weiberg, whom he had confined in jail six days in Philadelphia, before their sailing for St. Andero, and as soon as he was taken on board again, beat him and otherwise abused him, so that he lay three days disabled from doing any duty. That after their return to this port the last time, the libellants made application to a proctor of this court, to sue for the justice of the country in their behalf. That in prosecuting this business, they had been absent from the brig about three hours, and on their return to the vessel, the captain caused them both to be pinioned and confined; threatening them with a drawn cutlass and denouncing vengenance against them. And that afterwards, whilst this cause was before the court and during an adjournment thereof, the captain caused Weiberg, one of the libellants, to be laden with irons and chains, and confined on board the brig.

Under these circumstances, I am of opinion, First, that the deviation to the port of St. Andero (437) in Spain, was such an alteration of the voyage, as might justify the mariner in demanding his wages. And secondly, that captain Holmstedt's conduct with regard to the libellants, hath been so cruel and unwarrantable by the maritime law, as would of itself have dissolved the contract—The rights

of humanity being superior to the specific laws and customs of any nation:

Whereupon, I adjudge and decree, that Errick Weiberg and Nicholas Casterius be discharged from any further services on board the brig St. Oloff; and that they have and receive the sum of eighty-six dollars and twenty cents, in full of the wages respectively due to them. That is to say, to Errick Weiberg the sum of fifty-three dollars and eighty-six and two-thirds cents, and to Nicholas Casterius the sum of thirty two dollars and thirty-three and a third cents. And I do further decree, that the brig St. Oloff, with her tackle, apparel and furniture, or such parts thereof as may be necessary to satisfy this judgment, together with the charges and costs of suit, be sold by the marshal of this district, according to law and custom, for the purposes aforesaid.[1]

WELHAVEN, THE, (1892, U. S.—Norway)
55 Fed. Rep. 80.
Toulmin, District Court.

[Court refused to take jurisdiction in the case of an American seaman who claimed he shipped on a Norwegian ship for a trip between American ports and held that the Norwegian consul had jurisdiction under the treaty.—ED.]

WELSH v. HILL, (1807, U. S.—Cuba)
2 Johns. 373.
Hopkins, Supreme Court, New York.

Motion for commission—Affidavit.

Mr. Hopkins moved for a commission in this cause, to take the depositions of certain witnesses residing in Havana. The affidavit on which the motion was founded was made by the plaintiff, who resided in Havana, before the commercial and naval agent of the United States, resident at Havana, in the island of Cuba.

Mr. Henry, contra, objected that the affidavit had not been taken before a proper magistrate, and could not, therefore, be read in this court.

PER CURIAM. The affidavit is admissible for the purpose of the present motion.

Rule granted.

Cited in 47 Barb., 119.

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[1] In the case of Willendson vs. the Forsoket, vol. I, page 197, the practice of the court as to foreign seamen, is fully explained.

W. L. WHITE, THE, (1885, U. S.)
25 Fed. Rep. 503.
Brown, District Court.

[Discharge of a seaman under sect. 4,583 of revised statutes, as amended in 1884.—ED.]

WILBOR v. UNITED STATES, (1902, U. S.)
38 Ct. Cl. 1.
Howry, Court of Claims.

[Vice-consul claims half of consul-general's salary while he was absent.

Court decides that by waiting until death of consul-general and allowing settlement to be made vice-consul is presumed to have made an agreement with consul-general.—ED.]

WILCOX v. LUCO, (1896, U. S.)
45 Pac. 676.
McFarland, Supreme Court of California.

[Consul cannot waive his right to trial by federal courts, and state courts have, ever since the act of Feb. 18, 1875, no jurisdiction in cases affecting consuls.

A rehearing granted and the opinion reversed. see 50 Pac. Rep. 758.—ED.]

WILCOX v. LUCO, (1897, U. S.)
118 Cal. 639; 50 Pac. 758.
Harrison, Supreme Court of California.

[Since the act of Feb. 18, 1875, state courts have concurrent jurisdiction in suits affecting consuls. The jurisdiction of the state court cannot take away the jurisdiction of the local court, and consul may have his case reviewed by latter court, unless he waives this right, and if he suffers default he likewise waives this right.

Four judges concurred and McFarland (v. 45 Pac. 676) dissented. —ED.]

WILDENHUS'S CASE,[1] (1886, U. S.—Belgium)
120 U. S. 1; 7 Sup. Ct. Rep. 385.
Waite, Supreme Court.

Appeal from the circuit court of the United States for the district of New Jersey.

[1] Affirming 28 Fed. Rep. 924.

On habeas corpus. Judgment below dismissing the writ. Petitioner appeals.

F. R. Coudert and Edward K. Jones, for appellants, Mali, consul of his majesty the king of the Belgians, and others. C. H. Winfield, for appellee, keeper of the common jail of Hudson county, New Jersey.

WAITE, C. J. This appeal brings up an application made to the circuit court of the United States for the district of New Jersey, by Charles Mali, the "consul of his majesty the king of the Belgians, for the states of New York and New Jersey, in the United States," for himself, as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbosich, and Ostenmeyer from the custody of the keeper of the common jail of Hudson county, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." The facts on which the application rests are thus stated in the petition for the writ:

"Second. That on or about the sixth day of October, 1886, on board the Belgian steamship Noordland, there occurred an affray between the said Joseph Wildenhus and one Fijens, wherein and whereby it is charged that the said Wildenhus stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterwards died.

"Third. That the said Wildenhus is a subject of the kingdom of Belgium, and has his domicile therein, and is one of the crew of the said steamship Noordland, and was such when the said affray occurred.

"Fourth. That the said Fijens was also a subject of Belgium, and had his domicile and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

"Fifth. That, at the time said affray occurred, the said steamship Noordland was lying moored at the dock of the port of Jersey City, in said state of New Jersey.

"Sixth. That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said port of Jersey City was in nowise disturbed or endangered thereby.

"Seventh. That said affray occurred in the presence of several witnesses, all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or nearby.

"Eighth. Your petitioner therefore respectfully shows unto

this honorable court that the said affray occurred outside of the jurisdiction of the said state of New Jersey.

"Ninth. But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police authorities of Jersey City, in said state of New Jersey, have arrested the said Joseph Wildenhus, and also the said Gionviennie Gobnbosich and John J. Ostenmeyer, of the crew of the said vessel, (one of whom is a quartermaster thereof,) and that said Joseph Wildenhus has been committed by a police magistrate, acting under the authority of the said state, to the common jail of the county of Hudson, on a charge of an indictable offense under the laws of the said state of New Jersey, and is now held in confinement by the keeper of the said jail, and that the others of the said crew, arrested as aforesaid, are also detained in custody and confinement as witnesses to testify in such proceedings as may hereafter be had against the said Wildenhus."

Articles 8, 9, and 10 of a royal decree of the king of the Belgians, made on the eleventh of March, 1857, relating to consuls and consular jurisdiction, are as follows:

"Art. 8. Our consuls have the right of discipline on Belgian merchant vessels in all the ports and harbors of their district. In matters of offenses and crimes they shall make the examination conformably to the instructions of the disciplinary and penal code of the merchant service . They shall claim, according to the terms of the conventions and laws in vigor, the assistance of the local authorities for the arrival and putting on board of deserting seamen.

"Art. 9. Except in case the peace of the port shall have been broken by the event, the consul shall object to all attempts that the local authority might make to act in relation to crimes or offenses committed on board of a Belgian vessel by a man of the crew on another man of the same crew, or of the crew of another Belgian vessel . He shall take the proper steps to obtain that the cognizance of the case be turned over to him, in order that it be ultimately tried under the Belgian laws.

"Art. 10. When men belonging to the crew of a Belgian vessel shall be guilty of offenses or crimes out of the ship, or even on board the ship, against persons not of the crew, the consul shall, if the local authority arrests or prosecutes them, take the necessary steps to have the Belgians so arrested treated with humanity, defended, and tried impartially."

The application in this case was made under the authority of these articles.

Article 11 of a convention between the United States and Belgium "concerning the rights , privileges, and immunities of consular

officers," concluded March 9, 1880, and proclaimed by the president of the United States, March 1, 1881, (21 St. 123,) is as follows: "The respective consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port, or when a person of the country, or not belonging to the crew, shall be concerned therein. In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The claim of the consul is that, by the law of nations and the provisions of this treaty, the offense with which Wildenhus has been charged is "solely cognizable by the authority of the laws of the kingdom of Belgium," and that the state of New Jersey is without jurisdiction in the premises. The circuit court refused to deliver the prisoners to the consul, and remanded them to the custody of the jailer. 28 Fed. Rep. 924. To reverse that decision this appeal was taken.

By sections 751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the constitution or a law or treaty of the United States," and the question we have to consider is whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch, 144: "It would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amendable to the jurisdiction of the country." United States v. Diekelman, 92 U. S. 520; 1 Phillim. Int. Law, (3d Ed.) 483,

§ cccli.; Twiss, Law Nat. 229, § 159; Creasy, Int. Law, 167, § 176; Halleck, Int. Law, (1st Ed.) 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina v. Cunningham, Bell, Cr. Cas. 72; S. C. 8 Cox, Crim. Cas. 104; Regina v. Anderson, 11 Cox, Crim. Cas. 198, 204; S. C. L. R. 1. Cr. Cas. 161, 165; Regina v. Keyn, 13 Cox, Crim. Cas. 403, 486, 525; S. C. 2 Exch. Div. 63, 161, 213. As the owner has voluntarily taken his vessel, for his own private purposes, to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance, for the time being, as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce, should require. But, if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

The first of these conventions entered into by the United States after the adoption of the constitution was with France, on the fourteenth of November, 1788, (8 St. 106,) "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls," article 8 of which, is as follows: "The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters in all the disputes which may there

arise. They shall have entire inspection over the said vessels, their crew, and the changes and substitutions there to be made, for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of The Sally and The Newton arose, an account of which is given in Wheaton's Elements of International Law , (3d Ed.) 153, and in 1 Phillimore's International Law, (3d Ed.) 484, and (2d Ed.) 407. The Sally was an American merchant vessel in the port of Marseilles, and the Newton a vessel of a similar character in the port of Antwerp, then under the dominion of France. In the case of The Sally, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and, in that of The Newton, one seaman had made an assault on another seaman in the vessel's boat. In each case the proper consul of the United States claimed exclusive jurisdiction of the offense, and so did the local authorities of the port; but the council of state, a branch of the political department of the government of France to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of the American ship Newton by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship Sally upon one of the seamen for having made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheat. Elem. (3d Ed.) 154. The case of The Sally was simply a quarrel between certain of the crew while constructively on board the vessel, and that of The Newton grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted to the consul by the treaty.

No other treaty or convention bearing on this subject, to which our attention has been called, was entered into by the United States until a treaty with Sweden and Norway, on the fourth of September, 1816, (8 St. 232,) where it was agreed, by article 5, that "the consuls and their deputies shall have the right, as such, to act as judges and arbitrators in the differences which may arise between the captains and crews of the vessels of the nation whose affairs are intrusted to their care. The respective governments shall have no right to inter-

fere in matters of this kind, except the conduct of the captain or crew shall disturb the peace and tranquillity of the country in which the vessel may be, or the consul of the place shall feel himself obliged to resort to the interpesition and support of the executive authority to cause his decision to be respected and maintained; it being, nevertheless, understood that this kind of judgment or award shall not deprive the contending parties of the right which they have, on their return, to recur to the judicial authorities of their own country."

Subsantially the same provision is found in treaties or conventions concluded with Prussia in 1828, art. 10, (8 St. 382;) with Russia in 1832, art. 8, (8 St. 448;) with Greece in 1837, art. 12, (8 St. 504;) with Hanover in 1840, art. 6, (8 St. 556;) with Portugal, also in 1840, art. 10, (8 St. 564;) with the grand duchy of Mecklenburg-Schwerin in 1847, art. 9, (9 St. 916;) with Oldenburg in 1847, (9 St. 868;) with Austria in 1848, art. 4, (9 St. 946;) with the Hanseatic republics in 1852, art. 1, (10 St. 961;) with the Two Sicilies in 1855, art. 19, (11 St. 650;) with Denmark in 1861, art. 1, (13 St. 605;) and with the Dominican republic in 1867, art. 26, (15 St. 487.)

In a convention with New Grenada concluded in 1850 the provision was this: "They [the consuls, etc.] may cause proper order to be maintained on board vessels of their nation, and may decide on disputes arising between the captains, the officers, and the members of the crew, unless the disorders taking place on board should disturb the public tranquillity, or persons not belonging to the crew or to the nation in whose service the consul is employed; in which case the local authorities may interfere." Article 3, cl. 8, (10 St. 903.)

Following this was a convention with France, concluded in 1853, (10 St. 996,) article 8 of which is as follows: "The respective consuls general, consuls, vice-consuls, or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the

mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

The same provision, in substantially the same language, was embraced in a convention with Italy in 1868, art 11, (15 St. 609;) and in another with Belgium, also in 1868, art 11, (16 St. 761.) This convention with Belgium continued in force until superseded by that of 1880-81, under which the present controversy arose.

The form of the provision found in the present convention with Belgium first appeared in a convention with Austria concluded in 1870, art. 11, (17 St. 827,) and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the conventions with the German Empire in 1871, art. 13, (17 St. 928;) with Netherlands in 1878, art. 11, (21 St. 10;) with Italy in 1881, art. 1, (22 St. 18;) with Belgium in 1881, as stated above; and with Roumania, the same year, art. 11, (23 St. 3.)

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship, and jurisdiction in civil matters arising out of disputes or differences on board; that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of The Sally and The Newton are illustrative of this position. That of The Sally related to the discipline of the ship, and that of The Newton to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the state which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board, and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is sub-

stantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose," of the people who look to the state of New Jersey for their protection. If the thing done—"the disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads, and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder," the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act it to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on

shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignity of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction; and that, if the proper authorities are proceeding with the case in a regular way, the consul has no right to interefere to prevent it. That, according to the petition for the *habeas corpus* is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of The Sally and The Newton, by a decree of the council of state, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the count of cassation, the highest judicial tribunal of France, upon full consideration, held, while the convention of 1853 was in force, that the French courts had rightful jurisdiction , for reasons which sufficiently appear in the following extract from its judgment: "Considering that it is a principle of the law of nations that every state has jurisdiction throughout its territory; considering that, by the terms of article 3 of the Code Napoleon, the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws; considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to the good order and to the dignity of the government; considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law, [*droit commun*, the law common to

all civilized nations,] the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignity, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1Ortolan, Diplomatic de la Mer (4th Ed.) 455, 456; Sirey, (N. S.) 1859; p. 189.

The judgment of the circuit court is affirmed.[1]

WILDENHUS, IN RE,
28 Fed. Rep. 924. See "Wildenhus's Case" 120 U. S. 1.

WILHELM FREDERICK, THE, (1823, Great Britain)
1 Hag. 138; Edwards 128.
Lord Stowell, High Court of Admiralty.

[Cited in Bucker v. Klorkgeter.—Lushington maintained that ambassador's consent was necessary to take jurisdiction.—Phillimore argued that consul-general had always been considered as giving the "consent of the accredited agent of the government, to which the suitors belong, as was observed in the case of the Courtney, which has been cited."

Lord Stowell said in this case ambassador's consent had been given, and that the ship was British anyway.—ED.]

WILLENDSON v. THE FORSOKET, (1801, U. S.—Denmark)
1 Pet. Ad. 197; Fed. Cases 17,682.
Richard Peters, District Court.

The claimant, a foreign seaman, and one of the crew of a Danish ship, belonging to Altona, cited the master on a claim for wages. Although bound by the articles to return to Altona, the seaman alleged a discharge at Philadelphia. The captain denied the discharge, and charged the mariner with desertion, for more than twenty-four hours, which, by the Danish laws, forfeited wages. He had refused to admit the seaman into the ship, and the sailor stayed on shore at lodgings for a considerable time: there were faults on both sides; but the master now offered to take him again on board, on his promise of good behavior in future, and to forgive all past offenses.

It was insisted, that this was a case in which the court ought to interfere, the contract being at an end, by the alleged discharge, and the sailor, in a Danish court, would not have the benefit of the

[1] From 7 Sup. Ct. Rep. 385.

proof of which he was here possessed, to repel the charge of desertion, and support of his alleged discharge.

JUDGE.—It has been my general rule not to take cognizance of dispute between the masters and crews of foreign ships. I have commonly referred them to their own courts. In some very peculiar cases, I have afforded the seamen assistance, to pro- (198) tect them against oppression and injustice; and in cases where the voyage was broken up, or ended here, I have compelled the payment of wages. Masters too have always been assisted in recovering deserters, and reducing to obedience perverse and rebellious mariners; these must be restored only to the ship from which they abscond. Under pretext of carrying home deserting seamen, attempts have been made to increase the force, by adding to the numbers, of an armed belligerent ship. Neither assistance or permission should be afforded for this purpose in a neutral territory. In the case now before me, I see no cause to warrant my taking cognizance. It is the duty of the master to return the seaman to his own country. This he offers to do. —It is my duty, from motives of justice, and reciprocal policy, to discourage foreign seamen under engagements to perform their voyage, from breaking their contracts, with any views of obtaining higher wages, or from other unjustifiable motives, quitting the service in which they are engaged. Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country. Whatever ill humors or misconduct may have prevailed between the parties in this suit, the master now places the matter on a reasonable ground. He must give the sailor a certificate of forgiveness of past offenses, to avail him in his own country. If he takes the seaman on board, and there shall appear no deception in the present offer, I shall not further interfere, but dismiss the suit. If any difference should hereafter arise, it must be settled by a Danish tribunal. (199)

It was stipulated on the part of the captain, by authority from the Danish consul, that the master should *bona fide* comply with his engagement, and pay the sailor's debt for boarding, to be deducted out of his wages.

WILLIAM HARRIS, THE, (1837, U. S.)
Ware, 372; Fed. Cases 17,695.
Ware, District Court.

(Extract) But the allegation in the libel is that the libellant was ordered to be imprisoned by the American consul, and it seems to be assumed in the argument that this would relieve the master from his responsibility. In the first place it is to be remarked that

the order of the consul was obtained by the master on his own *ex parte* representation. And in the second, (379) that a consul has no authority to commit seamen to prison. The laws of the United States invest their consuls and commercial agents with certain powers to be exercised for the benefit and protection of American seamen when in foreign ports; as for the relieve of destitute mariners and furnishing them with the means of returning home. But no portion of the judicial power of the United States is conferred on consuls. They cannot take cognizance of the offences of seamen in foreign ports and sentence them to punishment. When the master of a vessel finds it necessary for the purpose of preserving discipline on board his ship and maintaining his authority, to treat any of his crew with severity, as a matter of prudence it may be well for him to consult the consul and take his advice. This is usually done on his own representation of the case, but the interposition of the consul has never been supposed to exempt the master from his own responsibility. Wilson v. The Mary, Gilpin, 31.

WILLIAMS v. THE WELHAVEN, See The Welhaven.

WILSON v. THE MARY, (1828, U. S.)
Gilp 31; Fed. Cases 17,823.
Hopkinson, District Court.

(Extract) I will take this occasion to notice an error which, I fear, has frequently, as in this instance, misled our masters of vessels. They seem to believe that they may do anything, provided they can obtain the assent of the consul to it; which assent consuls are apt to give with very little consideration. When the master, on his return, is called upon to answer for his conduct; he thinks it is enough to produce a consular certificate approving his proceeding; or to say, he consulted the consul, or acted on his advice. This is altogether a mistake. It is certainly a very prudent precaution to consult the consul, in any difficulty, and if the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act; nor deprive those, who have been injured, of their legal rights and remedies.

WOPE v. HEMENWAY, (1855, U. S.)
1 Sprague 300; Fed. Cases 18,042.
Sprague, District Court.

[See Snow v. Wope where this case was affirmed.

This case contains an interesting account of the imprisonment of seamen and failure of consul to perform his duty.—Ed.]

WYMAN, IN RE, (1906, U. S.—Russia)
77 N. E. 379; 191 Mass. 276.
Lathrop, Supreme Court of Massachusetts.

Appeal from Probate Court, Middlesex County.

Petition of Charles F. Wyman, Russian vice-consul, for appointment as administrator of the estate of Julius Saposnik. From a decree dismissing the petition, petitioner appeals on an agreed statement of facts. Reversed.

Frederic B. Greenhalge, for public administrator. Frederic R. Coudert and John H. Appleton, for appellant.

LATHROP, J. On the agreed facts in this case we have no doubt that the judge of the probate court erred in appointing a public administrator as administrator of the estate of a Russian subject dying here intestate and leaving personal property, and in dismissing the petition of the Russian vice-consul on the ground that it did not appear that he had a legal right to be appointed administrator of the estate to the exclusion of the public administrator.

By article 8 of the treaty of December 6-18, 1832 (8 Stat. 448,) between Russia and the United States, it was provided: "The two contracting parties shall have the liberty of having in their respective ports consuls, vice-consuls, agents, and commissaries of their own appointment, who shall enjoy the same privileges and powers of the most favored nation." The same treaty in article 10 provides: "The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise, and their representatives, being citizens or subjects of the other party shall succeed to their said personal goods, whether by testament or *ab intestato,* and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

(380) Under the most favored nation clause reliance is had upon the provisions of the treaty of July 10, 1853, between the Argentine Republic and the United States (10 Stat. 1001,) which read as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conform-

ably with the laws of the country, for the benefit of the creditors and legal heirs." See, also, article 8 of the treaty between Costa Rica and the United States of July 10, 1851 (10 Stat. 921.)

There is but little authority directly in point, on the question raised by this appeal. In Lanfear v. Ritchie, 9 La. Ann. 96, decided in 1854, the decision was against the vice consul of Sweden and Norway, on the ground that the right claimed was "incompatible with the sovereignity of the state." But this was at a time when we might expect the doctrine of state rights to be strongly insisted upon. On the other hand, there are two decisions in the Surrogate's Court for Westchester county, N. Y., which fully sustain the position of the vice-consul in the case before us. These cases are well considered and cover the entire ground. Estate of Tartaglio, 12 Misc. Rep. 245, 33 N. Y. Supp, 1121; In re Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119. None of these cases are binding upon us, and the case must be decided on general principles.

Among the powers conferred upon the president by article 2, § 2, of the constitution of the United States, is this; "He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur." By article 6 it is declared: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Treaties are to be liberally construed. Shanks v. Dupont, 3 Pet. 242, 249, 7 L. Ed. 666; Hauenstein v. Lynham, 100 U. S. 483, 487, 25 L. Ed. 628. When, then, anything in the constitution or laws of a state are in conflict with a treaty, the latter must prevail, and this court has not hesitated to follow this rule, which is generally recognized as the law of the land. Tellefsen v. Fee, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379; Ware v. Hylton, 3 Dall. 199, 237. 1 L. Ed. 568;United States v. Forty-three Gallons of Whisky, 93 U. S. 188, 197, 23 L. Ed. 846; Hauenstein v. Lynham, 100 U. S. 483, 489, 25 L. Ed. 628; the Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798, per Miller, J.; Geofroy v. Riggs, 133 U. S. 258, 267, 10 Supt. Ct. 295, 33 L. Ed. 642; In re Parrott (C. C.) 1 Fed. 481.

While it may be true that there is some limit to the powers of the president and Senate in making treaties, as has been intimated in some of the cases in the supreme court of the United States, we cannot accede to the contention of the counsel of the public administrator, that the treaties in question in this case are beyond the jurisdic-

tion of the treaty making power; nor can we accede to the further contention as to the construction of the treaty which was adopted by the judge of the probate court. We might perhaps stop here, but as the question of giving a bond is sure to arise, we are of the opinion that the vice consul, as he has applied for letters of administration, and thus has submitted himself to the court, should be required to give a bond, and in other respects to conduct himself with respect to the estate as would any other administrator.

The order, therefore, will be: Decrees of the probate court reversed.

OPINIONS OF THE ATTORNEYS GENERAL

Vol. I, p. 41 (Bradford)

RESPECT DUE TO CONSULS

A riot before the house of a foreign consul by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, and insulting him with improper language, is an offence *not* within the act of the 30th of April, 1790, for the punishment of certain crimes against the United States.

A consul is not a public minister, nor entitled to the privilege attached to the person of such an officer. As the law now stands, the offence in question cannot be legally prosecuted in the courts of the United States. If, however, the grand jury will present the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for judicial determination.

Philadelphia, *February* 20, 1794.

Sir: By the correspondence between the British consul at Norfolk and the attorney of the United States for the district of Virginia, which you transmitted to me for consideration, it appears that a question has arisen, whether a riot committed by a number of persons tumultuously assembled before the house of a foreign consul, requiring him to deliver up certain persons supposed to be resident with him, and insulting him (42) with improper language, can be the subject of prosecution in the courts of the United States. I have now the honor to state to you my opinion on that point, agreeably to your request.

Upon the best consideration I can give the subject, I am satisfied that this offense is not within the act of the 30 April, 1790, for the punishment of certain crimes against the United States. The only section which in any degree relates to it, is that which prescribes the punishment "for any infraction of the laws of nations, by offering violence to the person of an ambassador *or other public minister:*" but this cannot reach the offence in question, because it is now fully settled that a consul is not a public minister. He is not considered as such by the writers on the law of nations, because he is not in any degree invested with the representative character; and it has, more than once, been judicially determined that he is not entitled to the privileges attached to the person of every public minister. The constitution of the United States also distinguishes between them, where it extends the judicial power "to all cases affecting ambassadors, *other public ministers,* and consuls." The same distinction is carefully ob-

served in the 13th section of the act establishing the judicial courts of the United States.

An argument in favor of the jurisdiction of these courts over offences of the kind in question, seems to result from the clause in the constitution just referred to; but it may be observed, that these words (sufficiently indefinite in themselves) have received a construction, and seem to be limited to prosecutions "or suits *against* consuls," and to "suits in which a consul shall *be a party.*" It may be further remarked, that by the constitution the supreme court is to have original jurisdiction "in all cases affecting ambassadors, other public ministers, and consuls." If this be construed necessarily to include *criminal* offences against consuls, it would, as the courts are constituted, defeat the provisions of the very next clause, which directs "that all crimes shall be tried in the state where they are committed."

I therefore coincide in opinion with the district attorney, that, as the law now stands, the offence in question cannot be legally prosecuted in the courts of the United States. But, sir, (43) if the party injured is advised or believes that the federal courts are competent to sustain the prosecution, I conceive he ought not to be concluded by my opinion or that of the district attorney. If he desires it, he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to *present* the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for *judicial* determination.

I have the honor, &c.,

WM. BRADFORD.

To the Secretary of State.

Vol. I, p. 43 (Bradford)

DUTIES OF DISTRICT MARSHALS

Marshals are not required by law to execute the sentence of a French consul, arising under the 12th article of the convention with his most Christian majesty and the United States.

New York, *March* 6, 1794.

I have considered the twelfth article of the convention between his late Most Christian Majesty and the United States of America, and also the act of congress concerning consuls and vice-consuls, as far as it prescribes the duty of the marshals of the United States; and it is my opinion that the marshals are not bound by the law to execute any sentence of a French consul, arising under the said article.

RICH. HARRISON.

Attorney United States for the New York District.

Philadelphia, *March* 14, 1794.

I have considered the convention and acts above referred to, and I perfectly coincide in the opinion given by the attorney of the United States for the district of New York.

WM. BRADFORD.

Vol. I, p. 77 (Lee)

CONSULAR PRIVILEGES

A consul is not privileged from legal process by the general law of nations, nor is the French consul-general by the consular convention between the United States and France. Though a consul, for a transaction, in which he acted as the commercial agent of his government, the president has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice.

Philadelphia, *November* 21, 1797.

Sir: I have taken into consideration the letter of citizen Letombe, consul-general of the French republic in the United States of America, bearing date the 16th instant, with the several papers which accompanied it.

The United States have acknowledged citizen Letombe in the character of consul-general; and thus only they know him. As such, he is not privileged from legal process, either by the (78) general law of nations, or by the consular convention between the United States and France; and, if he is authorized to represent the republic of France in any ministerial character, he has never yet so offered himself or been received. The second article of the convention seems to me to preclude all doubt respecting the suability of the consul-general. The immunities and privileges annexed to his office are there distinctly enumerated; and, in all other respects, he is subject to the laws as our own citizens are. Though the transaction which has given rise to the suit instituted by John Coffin Jones was not of a private character, but of a public nature, which concerned the republic of France, and in which the consul-general acted as the commercial agent of the republic; yet the President of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice.

It does not belong to me, in my public capacity, to advise how the consul-general may proceed to relieve himself from the obligation of giving bail; yet, having a wish that every inconvenience may be avoided by him, consistent with the laws of our country, I will venture to suggest that the right to hold him to bail, or to recover the debt from him, cannot, in my opinion, be maintained; and as to the former, any one of the justices of the supreme court is competent to decide

at his own mansion, whenever application shall be made. The reason for this opinion is, that it evidently appears the contract was founded on the credit of the French republic only, and not on the private credit of citizen Letombe.

I am, &c., &c.,

CHARLES LEE.

To the Secretary of State.

Vol. I, p. 81 (Lee)

ACTIONS AGAINST FOREIGNERS

The president will not interfere with judicial proceedings between an individual and the commissioner of a foreign nation where the controversy may have a legal trial. But a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judicial tribunal in the United States.

Philadelphia, *December* 29, 1797.

Sir: I have taken into consideration your letter of the 23d, enclosing the note of his Britannic Majesty's minister, and the copy of Henry Sinclair's memorial, complaining of two suits now depending against him in a court of law at Alexandria. If the cause of action is fully and truly stated in the memorial, Henry Sinclair, upon a plea to the jurisdiction of the court, ought to prevail before the court; for it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amendable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.

Though this be so, yet, according to the constitution and laws of the United States, the executive cannot interpose with the judiciary proceedings between an individual and Henry Sinclair, whose controversy is entitled to a trial according to law, and to whom it is hoped justice will be impartially and speedily administered.

The principle on which the interference of the president might be thought proper is the same that has been settled in the case of General Collot, and I believe in some other cases; in all of which there has been one and the same opinion against the power of the executive to interfere.

I am, &c., &c.,

To the Secretary of State. CHARLES LEE.

Vol. I, p. 378 (Wirt)

EXECUTION OF A CONSULAR BOND

Attestation is not essential to the validity of a consular bond.

Office of the Attorney General,
June 30, 1820.

Sir: I know not by what accident your communication enclosing Mr. Strong's bond of office has been misplaced, so as never to have been brought to my notice till this time. I regret the accident, although it can have produced no public inconvenience.

It is not essential to the validity of a consular bond that it should be attested. The plea of *non est factum* would, in such a case, be sufficiently met by proof of the handwriting. The acknowledgment of it before Mr. Jay would constitute him a sufficient witness, even if his official certificate should be decided to be insufficient. The bond is herewith returned.

I have the honor, &c., &c., &c.,

WM. WIRT.

To the Secretary of State.

Vol. I, p. 406 (Wirt)

FOREIGN MINISTERS, CONSULS, &c.

Foreign consuls and vice-consuls are not public ministers within the law of nations, or the acts of congress, but are amenable to the civil jurisdiction of our courts; and in the case of the Genoese consul (2 Dallas, 297) it was held that they were not privileged from prosecutions for misdemeanors.

But consuls are bound to appear only in the federal courts; the constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the state courts, in which they shall answer.

Office of the Attorney General,
December 1, 1820.

Sir: I have examined, with the respect and attention to which it is justly entitled, the letter of General Vives, the minister of his Catholic Majesty, which you have done me the honor to submit for my official opinion; and now proceed to give you the result of this examination.

The complaint is, that Mr. Vallavaso, the Spanish vice-consul at New Orleans, has been arrested and held to bail at the suit of Mr. Seré, of that place, for an alleged injury to the property of commercial pursuits of the latter; and General Vives calls on the President of the United States to suspend the proceeding in this case, on the ground that Mr. Vallavaso, being a public functionary of his Catholic Majesty, is protected from arrest by the law of nations, is not subject to the jurisdiction of our tribunals, and can be made to answer for this alleged injury only to the sovereign from whom he derives his commission.

The president possess no powers but those which he de- (407)

rives from the constitution and laws of the United States; and these give him no authority to interfere in this case. It is not a criminal proceeding, in the name of the United States: if it were, the president might, if he thought it proper, arrest the proceedings by a *nolle prosequi*. But this is a civil suit, in the name of an individual, brought before the courts of our country, for the redress of a private commercial injury. Mr. Vallavaso may plead to the jurisdiction of the court, and bring the question, if he chooses, before the supreme tribunal of the nation; and his plea, if it be well founded, will protect him against the suit. But the subject being a civil individual suit, of which the judiciary has possession, the president has no authority to interpose in the case, either by arresting the proceedings, by punishing the plaintiff, or even ordering a prosecution against him, unless the step which he has taken be in violation of some law of the United States.

The only law which we have, that looks to the protection of foreign functionaries against civil suits, is the act of congress of the 30th April, 1790, " for the punishment of certain crimes against the United States;" the 25th and 26th sections of which are exact transcripts of the enacting clauses of the British statute of the 7th Anne, c. 10, entitled " an act for preserving the privileges of ambassadors and other public ministers of foreign princes and states."

It will not be thought foreign to a question which involves the efficacy of our government to protect its intercourse with foreign nations, to observe, that until the statute of Anne, to which I have just referred, the British Crown possessed no power to punish the violation of the person of an ambassador. The preamble of that statute recites the occasion of its enactment: it was, that "several turbulent and disorderly persons had, in a most outrageous manner, insulted the person of his excellency Andrew Artemononitz Mattireof, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, her Majesty's good friend and ally, by arresting him and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by her Majesty, contrary to the laws of nations," &c. The sequel of the transaction we have from (408) Blackstone's Commentaries, (vol. 1, p. 285.) The Czar insists that the sheriff of Middlesex and his accomplices should be put to instant death; and was much surprised to receive for answer, "that the Queen could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land; and, therefore, she was persuaded that he would not insist on impossibilities." The sheriff and his accomplices were, it is true, tried and found guilty of the

facts; but the question how far these facts were criminal, was reserved to be argued before the judges, but was never determined, the Czar having been appeased by the statute which was presented to him, under very humiliating circumstances, on the part of the Queen, with a repetition of the apology for her want of power as to the past, and a pledge of the act as a law for the future; whereupon the offenders were, at his request, discharged from all further prosecution. This statute of Anne is the first and last which has been passed by the British parliament, for the protection of foreign functionaries. Our act of congress is precisely commensurate with it; and the power which the British monarchy wanted to so late a period of its history, was conferred on our government in the first year of its formation.

If a consul be an ambassador or a minister, within the meaning of this act, the process is by the act declared null and void to all intents, constructions, and purposes whatsoever; and the plaintiff, and all others, concerned in the suing forth, prosecution, and execution of the writ, are, upon conviction, subject to imprisonment not exceeding three years, and to fine at the discretion of a court.

The functionaries protected by the act are "*ambassadors and other public ministers* of any foreign prince or state authorized, and received as such by the President of the United States." Are consuls within this description? Under the statute of Anne, (in which the descriptive words are precisely the same,) it has been determined that they are not. The question was raised by one Barbuit, a commercial agent of the King of Prussia, and was decided by the Lord Chancellor Talbot, in the 10th year of George II. The chancellor, after hearing counsel on the point, having proceeded to examine the nature of Barbuit's functions, for the purpose of ascertaining whether he came (409) within the description of a *public minister* used in the statute, and having observed on his wanting that essential feature of this character—"the being intrusted to transact affairs between the two crowns"—concludes thus: "At most, he is *only a consul.* It is the opinion of Barbeyrac, Wicquefort, and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors; and as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium* I cannot discharge him." (Talbot's cases, p. 281 *et seq.*) It is scarcely necessary to remark to you, sir, that our courts, in construing an act borowed from the British statute-book, constantly adopt the settled construction of the British courts, unless it be most palpaby wrong; which can scarcely be predicated of any decision made by the Lord Chancellor Talbot.

But that consuls are not public ministers in the sense of the laws

of nations, (which is that of our act,) does not depend on the authority of Lord Talbot alone; for to his own, and authorities cited by him, may be added those of Vattel, lib. 2, ch. 2, § 34; Bynkershoek, Traite du Juge Compet, ch. 10, § 5; Calliere, De la Manière de Negocier avec les Souverains, 1st part, p. 94, of the London edition of 1750; Bouchard, Thèorie de Traitès de Commerce, ch. 6, § 1; St. Real, Science du Gouvernement, t. 5, Droit de Gens, ch. 1, § 4 and 11; to which may be added the authority of Valin, Ordonnance de la Marine, tom. 1, lib. 1, tit. 9, De Consuls; and Brown's Civil Law, vol. 2, ch. 14. Supported by such authorities, I think it may be safely assumed that a consul is not a public minister within the meaning of our act, which is that of the general law of nations.

I am aware that some modern authors have treated the question "Whether a consul be a public minister," as a mere dispute about words. Such are Mr. De Stéck and Mr. Borel. And so it may be, in the abstract light in which they have taken up the question; but in relation to our act of congress, the question becomes a material question of things, and not merely of words; and on the grounds I have stated, I have no doubt that our supreme court would concur with the Lord (410) Chancellor Talbot in the opinion "that a consul is not a public minister, within the spirit and meaning of the statute;" and if so, there is no law within the United States which exempts the consuls of friendly powers, residing among us, from the jurisdiction of our courts; and none which authorizes the president to prosecute those who call them before those courts to answer civilly.

Is our condition, as a nation, singular, in this particular? If I understand General Vives correctly, it is; for I understand him to state it as a doctrine, "sanctioned by the most distinguished publicists," that those who consider themselves aggrieved by the acts of a consul of a friendly power residing among them, have no right to appeal to the courts of the country, and have no redress, except by applying to the government from which such consul derives his authority: in other words, that a consul is not responsible to the courts of the country in which he resides, either civilly or criminally, and can be called to answer to that sovereign alone under whom he holds his appointment.

With great respect for the opinion thus advanced, the authorities, whom it is usual to consult on such occasions, appear to me to hold a different language; and, so far as the civil responsibility of the consul is concerned, to concur, unanimously, in the opposite doctrine.

There are not wanting highly respectable authorities who maintain that a consul is subject to the whole extent of the criminal juris-

diction of the country in which he resides. Such are Wicquefort, De l'Ambassadeur et de ses Fonctions, lib. 1, § 5; Bynkershock, Tr. du Juge Comp. des Ambassadeurs ch. 10, § 6; and Brown, Civil Law, vol. 2, ch. 14. There are others who dispute this point, and who are not at present interested in settling it. The question with which alone we have now to deal, is the responsibility of the consul to the *civil jurisdiction* of the country; and I think it may be safely affirmed that there is no author of general notoriety in this country, who maintains the exemption of the consul from this branch of jurisdiction; and no one, who descends to the particular question at all, that does not , on the contrary, admit it.

Vattel, in the passage before cited, claims only an exemption from the *criminal* jurisdiction of the place, (except in the case (411) of enormous crimes;) and even this exemption is so far from being considered by him as an established principle, that he recommends it as the safer course to settle it by treaty.

Valin, (*qua supra,*) having spoken of consuls as the mere creatures of commercial arrangement between sovereigns, and as not belonging at all to the law of nations, gives us a history of their establishment in the Levant and elsewhere, and then proceeds to treat of their privileges thus: "The privileges of consuls depend either on treaties made between the respective states, or on custom, so far as the latter has not been controlled by particular treaties; *which custom, according to all appearance, is derived from the capitulations concluded between our kings, those of France, and the Turkish emperors.*"

It might be fairly objected to any consular claim of privilege derived from such a custom as this: 1st. That we are not parties to the treaties from whence the custom avowedly proceeds. 2d. That the privileges of consuls in the Levant (*dans les Echelles* du Levant) have always been greater than those of consuls who reside in more civilized countries; insomuch that Mr. Calliere, while he admits it as a general truth that consuls are not public ministers within the contemplation of the law of nations, yet says that *those who reside dans les Echelles du Levant* are regarded as minister. (Manière de Nègocier avec les Souverains, part 1, pages 94-5. London edition of 1750.) It is placing the dortrine on which I insist on the highest ground, therefore, to appeal to the privilege of consuls in the Levant as the standard. As to these privileges, Mr. Valin says the principal are these: 1st, that of not paying any taxes or imposts; 2d, not to be imprisoned for any cause whatever, *except to demand justice against them at the port—"sans à demander justice contr'eux à la Porte;" an exception* which (to say the least of it) covers the whole

ground for which I contend, of their subjection to the tribunals of the country for civil injuries. Mr. De Stéck, a most strenous advocate for the rights of consuls, has, in his essay, given us an elaborate synopis of all the stipulations as to consular privileges which are to be found in the commercial treaties of the world since the year 1604, and has there given us the results of this collation; which, so far as the present question is concerned, are: (412) 1st. That consuls are regularly exempt from the *criminal* jurisdiction of the sovereign and the magistrates of the country where they reside; at least, that they cannot be arrested or put in prison on such charges." 2d. "*Quant aux affaires et aux matières civiles, les consuls sont généralement soumis à la jurisdiction des tribunaux du pays et du lieu de leur établissement et de leur résidence. S'ils exercent de negoces, ils sont traités de la même facon et sur le même pied que les autres negocians.*"

It does not appear, by the statement of the case, whether Mr. Villavaso does or does not carry on trade. If he do, he is, according to this and all the other authorities, to be treated as other merchants are; but if he do not, he is still, according to Mr. De Stéck, subject, in civil matters, to the jurisdiction of the courts of the country. And it is in point to the particular case before us to observe, that the writer founds this result, among other authorities, on a treaty between Spain, herself, and France—Convention entre la France et l'Espague, conclue au Paris, le 13 ème Màrs, 1769, art. 2. (De Stèck, Essai sur les Consuls, sec. 7, p. 62-3: Berlin ed., 1790. De l'Origine et des Fonctions des Consuls, chap. 4, p. 40: St. Petersburg, 1807.)

Messrs. Callière and Borel do not descend to the particular question. The former merely says that, although not ministers, consuls enjoy some of the privileges of ministers. What they are, he does not specify. Mr. Borel satisfies himself with referring to the treaties between the European princes and the Porte, as well as those with the Regencies of Barbary, as giving the detail of consular privileges; and (waiving the exceptions already made to this source of information) it appears by Valin and De Stéck, that even in those countries consuls are subject to the civil jurisdiction of the place of their residence.

Our constitution and laws, contemplating the responsibility of consuls to the jurisdiction of our courts, have provided the tribunals before which they may sue and be sued or prosecuted; these are the tribunals of the nation, before which alone, in exclusion of the state courts, consuls are bound to answer.

I am not aware that the question of the liability of consuls to the jurisdiction of the courts of the country has been brought (413)

before any of our national courts, except in the case of the Genoese consul, reported 2 Dallas, 297. In this case, the circuit court of the United States, consisting of Judges Wilson, Iredell, and Peters, determined that the defendant, a consul of Genoa, was not privileged from prosecution *for a misdemeanor,* in virtue of his consular privileges.

The result of this examination is, that the president cannot interfere in the suit instituted by Mr. Seré against Mr. Villavaso; that if the process has been issued from a court of the state, the consul may abate the suit by pleading to the jurisdiction; that if it be before a national court, the consul may, if he choose it, bring the question before the supreme court of the nation, for final decision; and in the meantime, that, in my opinion, consuls residing among us are subject to the civil jurisdiction of our courts; in which respect, so far as we may rely on the authors who have treated of this subject, they are on the same footing here as in other countries.

I have the honor to be, most respectfully, your obedient servant,

WM. WIRT.

To the President of the United States.

Vol. II, p. 378 (Berrien)

AUTHORITY AND JURISDICTION OF CONSULS

Consular jurisdiction depends on the general law of nations, subsisting treaties between the two governments affected by it, and upon the obligatory force and activity of the rule of reciprocity.

French consular jurisdiction in an American port depends on the correct interpretation of the treaties subsisting between his Most Christian Majesty and the United States, and which limit it to the exercise of police over French vessels and jurisdiction in civil matters in all disputes which may there arise; (279) and provide that such police shall be confined to the interior of the vessel, and shall not interfere with the police of our ports where the vessels shall be. They provide also, that, in cases of crimes and breaches of the peace, the offenders shall be amenable to the judges of the country.

The claim of the French envoy, therefore, for the exercise of judicial power by the consul of his government in the port of Savannah, is not warranted by any subsisting treaties, nor by a rule of reciprocity which the executive has power to permit to be exercised.

Attorney General's Office,
September 8, 1830.

Sir: I have received your letter and the accompanying communication of M. Roux de Rochelle, envoy extraordinary and minister plenipotentiary of his Most Christian Majesty near this government, claiming for the consuls of his Majesty residing in the United

States exclusive jurisdiction over offenses committed on board of the merchant vessels of France by French subjects, while such vessels are lying in our ports, in all cases where the tranquillity of the port is not disturbed, and the aid of the local authorities is not invoked by the consul. M. Roux de Rochelle calls your attention to a particular case which has recently occured in the port of Savannah, in which he supposes the consular jurisdiction has been invaded by the interposition of the local judiciary; and asks you, after giving an attentive examination to the claim, to take such measures as may appear proper to avoid a recurrence of similar conflicts of jurisdiction.

In referring this communication to me, you request my opinion—

1. As to the validity of the claim asserted by M. Roux de Rochelle; and,

2. If valid, what steps it would be proper for the department to take towards satisfying it, and preventing the recurrence of similar complaints.

I proceed to state to you the result of my reflections on the first of these questions. The conclusion to which these have conducted me will dispense with the necessity of considering the remaining inquiry.

The claim of consular jurisdiction, which we are examining, must depend on the general law of nations, on treaties subsisting between the United States and his Most Christian Ma- (380) jesty, or on the activity and obligatory force of the rule of reciprocity which is urged in its support. Each of these shall be briefly considered.

The origin of the appointment of consuls is tracted to the necessity for extraordinary protection of certain branches of commerce formerly carried on with barbarous and uncivilized nations. Among civilized states, commercial agents of this character were more recently introduced. Even at this day, the custom of receiving them cannot, it is said by a late writer, be looked upon as universally established; and their rights, where they are admitted, differ very widely in different states. Those who are sent out of Europe exercise a pretty extensive jurisdiction over the subjects of their sovereign. In Europe, there are some places where they exert a *civil* jurisdiction, more or less limited, over their fellow-subjects residing there. In others, they have only a voluntary jurisdiction; while in others, their functions are limited to watch over the commercial interests of the state, particularly the observation of treaties of commerce, and to assist with their advice and interposition those of their nation whose commercial pursuits have led them to the place of their consulate.

In the *Cours de Droit Commercial,* by J. N. Pardessus, it is said

that a sovereign cannot invest a consul with judicial power, even over his own subjects in a foreign country, so as in that country to enforce the judgment according to the municipal law; but, that, nevertheless, the decision of a French consul in England, in questions between French subjects, will have effect in France. This, however, is in *civil* cases; for the same writer admits that, in all Christian countries, as it were by common consent, with reference to the administration of *penal* laws, the prosecution of *crimes* against foreigners is left entirely to the municipal tribunal of the place where they are committed. He adds, that a French consul cannot have *criminal* jurisdiction in a foreign country, unless it is expressly given; and that there is no instance of such a power in any christian country.

In a Treatise on the Laws of Commerce, &c., by Mr. Chitty, he remarks, with precise reference to such a case as the one under consideration, that it is said to be the indispensable duty (381) of the consul to imprison disorderly seamen on the complaint of their masters; yet he should be cautious how he punishes British seamen, or masters of ships, on their mutual complaint against each other, as it may subject him to an action for false imprisonment. According to the same writer, foreign consuls have no judicial power in England.

From the *Essai sur les Consuls*, par M. de Stéck, I extract the following: "Il faut cependant observer, que le pouvoir et les droits des consuls ne sont pas dans tous les pays de la même étendue. Les traités les modifient et les limitent différemment. Pour parvenir à fixer les principes en cette matière, il faut faciliter, parcourir, consulter les traités de commerce, en comparer les stipulations, en faire un précis, en tirer, et en inférer des conséquences et des resultats, et asseoir sur ces conslusions les idées et les principes."

I think, then, it must be sufficiently obvious that the principals of international law, as they are recognized in Europe, afford no warrant for the exercise of judicial power by consuls; and that the rights and duties of these functionaries depend, both for their authority and extent, upon the treaties subsisting between the governments respectively interchanging this species of commercial agents.

Turning to the treaties between the United States and France, I find that the 29th article of that of 1778 is in these words:

"The two contracting parties grant mutually the privilege of having, each in the ports of the other, consuls, vice-consuls, agents, and commissaries whose functions shall be regulated by a particular agreement." Here, as between the United States and the French government, is a complete recognization of the principle to which we have just referred—that consuls exist by force of treaties, which,

consequently, regulate their functions. The commercial convention which was subsequently, in 1788, entered into between the two powers, had for its object to define and establish the functions and privileges of their respective consuls and vice-consuls. The *eighth* article of that convention secured to these functionaries the right to "exercise police over all the vessels of their respective nations," and "jurisdiction in *civil* matters, in all disputes which may there arise." It was provided that this exercise of police (382) should, "be confined to the interior of the vessels," and that this should not interfere "with the police of the ports where the said vessels shall be." The *tenth* article declares that "where the respective subjects or citizens shall have committed any crime or breach of the peace, they shall be amendable to the judges of the country."

Even under that convention, then, the case which has given rise to the remonstrance of M. Roux de Rochelle would have been beyond the jurisdiction of the consul, and punishable only in the judicial tribunals of the country. But this compact was limited, by its own provisions, to twelve years after its date, and was specifically annulled by an act of congress passed the 7th of July, 1798. The tenth article of the convention of 1800, between the United States and the French republic, authorized the reciprocal appointment of commercial agents, and stipulated that they should respectively enjoy the rights and prerogatives of the similar agents of the most favored nations. This convention, however, which annulled that of 1788, (if that had not been effectually done by the act before referred to,) was itself limited to eight years, and has been succeeded by the commercial convention of June, 1822, the 6th article of which merely gives to the consuls and vice-consuls of the two nations, respectively, the right of arresting seamen who shall have deserted; and, for that purpose, requires them to address themselves to the courts, judges, and officers competent.

From this brief sketch of the diplomatic relations between the United States and his Most Christian Majesty, it will be seen that the consular claim to judicial power is not warranted by subsisting treaties between the two governments. M. Roux de Rochelle, nevertheless, informs you that the rule which allows it "is applied in France to the ships of the United States, as well as to those of other nations, in accordance with the wish of the American consuls themselves," which gives the French government, as he urges, "the right to enjoy an exact reciprocity in the ports of the Union."

From what is said by Mr. Chitty, I should infer that, if applied to British consuls exercising their functions in France, it cannot be reciprocated to French consuls residing in England. But, however this may be, in relation to the claim of (383) the consuls of France, as

derived from the obligation of this government to give effect to the rule of reciprocity, I have to remark, that, in the United States, the functions of its judicial officers cannot be interferred with by the executive power. Subjects which have been committed to the jurisdiction of the judicial department by the legislation of the Union, must remain so subject until withdrawn by exercise of similar authority, or, where the rights of foreign governments are concerned, by an act of the treaty-making power. However desirable, therefore, it may be to give operation to the rule of reciprocity, the power which is necessary to effect such an object does not belong to the executive. The supreme judiciary of the Union, in the case of the Nereide, disclaimed the right to call this rule into activity, and to apply it to a case then properly subjected to their jurisdiction; referring to the legislature as the only source of such an authority. The executive department of the government is equally powerless in this regard.

It will be obvious to you, from the preceding remarks, that the opinion which I entertain is adverse to the claim of consular jurisdiction asserted by M. Roux de Rochelle; and this dispenses with the necessity of replying to your remaining inquiry.

JN. MacPHERSON BERRIEN.

To D. Brent, Esq., Department of State.

Vol. II. p. 521 (Taney)

PROVISIONS FOR WIDOWS OF CONSULS WHO DIE IN OFFICE

The executive will pay to the widow of a consul, having a salary, who has died in office abroad, upon her return, the amount which it has been customary to pay to consuls themselves upon their recall, viz: his salary for three months.

The funeral expenses of the deceased consul, and the incidental and contingent expenses of the consulate after his death, are a fair item of charge on the fund for contingent expenses of foreign intercourse.

And where the son of the deceased consul remains at the port and discharges duties of consul which are recognized by the government, he may receive the compensation fixed by law for such services.

Such was the practice of the government in the cases of Messrs. Folsom, Heap, Simpson, and Hodgson.

Attorney General's Office,
May 31, 1832.

Sir: The claim of Mrs. Coxe and her son, upon which you have called for my opinion, presents, in one respect, a new case. Mr. Coxe, it appears, is the first of our consuls to the Barbary States who has died while in office, and his widow and family have been obliged to return home at their own expense; and Mrs. Coxe presents a claim against the government for these expenses.

Under the act of May 1, 1810, there can be no outfit allowed to a consul, nor is there any authority given to pay his expenses home; but, by practice of the government, it has been (522) usual to consider him in office, and therefore entitled to his salary, after leaving his station, for a time sufficient to enable him to return home. And as it was desirable that some certain period of time should be fixed on, in order to avoid the necessity of a particular examination in every case, three months appear to have been adopted as a reasonable time in such cases, and accounts have, I understand, been settled accordingly.

If, therefore, Mr. Coxe had lived to return with his family, he would have been entitled to three months' pay after leaving his station. This interpretation of the law of May 1, 1810, appears to be a reasonable and just one. His salary goes on while the consul is performing his outward voyage, and there seems to be no ground for denying it to him on his return. He is, however, during that period of time, rendering no service; and the allowance of the salary for three months after leaving his station is evidently made to enable him to return to his own country; and, as his term of office is construed to endure for that purpose, although he is not discharging any of its functions, it would seem that the same principle may with equal propriety be applied to the case of his widow; and three months' salary, from the time of his death, may be paid to her, in order to enable her to return with her family. This, I think, is not only an equitable construction of the law, but one which, from the nature of the public service in which a diplomatic agent is engaged, is called for by the principles of justice; and it would be a severe and harsh construction of it to deny, after his death, to his widow and family, those means of coming again to their home which would have been offered to them by the public if he had lived. But I do not think more can be allowed for their expenses than the usual salary for three months.

The funeral expenses appear to me to be a fair item of charge on the fund for the contingent expenses of foreign intercourse. The act of May 1, 1810, gives the consul at Tripoli two thousand dollars per annum, as a compensation "for his personal expenses and services," but does not forbid the allowance of expenses other than personal. And, indeed, the language used in the law necessarily implies that other expenses are contemplated, and are to be allowed. And as the consuls to the Bar-(523)bary States are diplomatic agents of this government, they are entitled to be repaid, out of the appropriation to defray the contingent expenses of foreign intercourse, such incidental expenses as are usually allowed in the case of other diplomatic agents; and, as the funeral expenses of such officers, when they

have died abroad, have been borne by the public, I see no reason why it should not be done in the case of Mr. Coxe. Indeed, the honor and dignity of the government require that the funeral of its representative in a foreign country should be decently and properly attended to.

The incidental and contingent expenses of the consulate which occurred after the death of Mr. Coxe, if properly vouched, ought, I think, also to be paid by the government as it is a part of the expenses of foreign intercourse; and, although the money was not paid by a consul regularly appointed, yet, if it were paid by one who was acting in that character and discharging its duties, and if the expenses were proper to be incurred, and were incurred for the public service, they ought to be repaid, and appear to me to be a lawful charge on the contingent fund above mentioned.

The salary claimed by Charles J. Coxe, during the time he acted as consul, may, I think, be legally paid to him as salary. The law of May 1, 1810, gives the salary to the consul for his personal service and expenses. If, after the death of Mr. Coxe, his son performed the services and incurred the expenses of a residence there, and his acts have been recognized by the government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* consul for the time, and the public received the benefit. What services he performed, or had to perform, I have not the means of knowing; and the opinion I express is founded on the presumption that he rendered faithfully whatever services a consul duly appointed would have rendered for the time, and that the government have adopted his acts in that character. The practice of the government sanctions this opinion, as appears by the papers before me; and in several instances similar to this, since the law of 1810, the salary has been paid. I refer to the cases of Mr. Folsom, in 1818 and 1819; Mr. Heap, in 1823 and 1824; Mr. Simpson, in 1820 and 1821; and Mr. Hodgson, in 1819.

(524) The public interest requires that the duties of the office should be discharged by some one; and where, upon the death of the consul, a person who is in possession of the papers of the consulate, enters on the discharge of its duties, and fulfils them to the satisfaction of the government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public; and, if he is so recognized, the law of congress entitles him to his salary.

R. B. TANEY.

To the President of the United States.

Vol. II. p. 725 (Butler)

IMMUNITIES OF FOREIGN CONSULS

Foreign consuls in the United States are entitled to no immunities beyond those enjoyed by foreigners coming to this country in a private capacity, except that of being sued and prosecuted exclusively in the federal courts.

If any foreign consul shall be guilty of any illegal or improper conduct, he will be liable to the revocation of his *exequatur* and to be punished according to our laws; or he may be sent back to his own country, at the discretion of our government.

Attorney General's Office,
September 16, 1835.

Sir: In your communication of the 20th ultimo, you inform me that you have been instructed by the president to request my opinion as to the immunities of foreign consuls in the United States under the laws of nations and the constitution and laws of the United States.

After a careful consideration of this subject, I am of opinion that foreign consuls in the United States are entitled to no immunities beyond those enjoyed by persons coming to this country in a private capacity from foreign nations, except that of being sued and prosecuted exclusively in the United States courts, under the jurisdiction conferred on them by the constitution and laws of the United States. The question whether consuls are entitled to the privileges belonging to public ministers, has been much discussed by writers on the law of nations and in the English and American courts of justice. The statements of Chancellor Kent, in his recent Commentaries on (726) American Law, (vol. 1, sec. 2,) are fully supported by the text books and decisions to which he refers; and I therefore take the liberty of quoting them, as expressing my own opinion on this point.

"If any consul be guilty of illegal or improper conduct, he is liable to have his *exequatur* (or a written recognition of his character) revoked, and to be punished according to the laws of the country in which he is consul; or he may be sent back to his own country, at the discretion of the government which he has offended.

"A consul is not such a public minister as to be entitled to the privileges appertaining to that character; nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for safe conduct; but he is not entitled to the *jus gentium*. Vattel thinks that his functions require that he should be independent of the ordinary criminal jurisdiction of the country; and that he ought not to be molested, unless he violate the law of nations by some enormous crime; and that, if guilty of any crime, he ought to be sent home to be punished. But no such immunities have been conferred on consuls by the modern practice of nations; and it

may be considered as settled law, that consuls do not enjoy the protection of the laws of nations any more than any other persons who enter the country under a safe conduct. In civil and criminal cases, they are equally subject to the laws of the country in which they reside. The same doctrine, declared by the public jurists, has been frequently laid down in the English and American courts of justice."

B. F. BUTLER.

To the Secretary of State.

Vol. III. p. 405 (Grundy)

SEIZURE FOR SUSPECTED INTENTION TO PROSECUTE SLAVE TRADE

Attorney General's Office,
January 12, 1839.

(406) (Extract) Sir: In this case, it appears that Captain Howell, commander of the brig "Thomas, of Havana," entered the port of Havana, and immediately reported to Mr. Trist, United States consul at that place. The papers of the vessel presented by him to the consul were evidently fradulent, and not such as, under the laws of congress, would entitle his vessel to that protection which is due to every vessel which in truth belongs to the United States, and sailing lawfully under their flag. Under these circumstances, Mr. Trist informed Captain McKenney, commander of the Ontario, a public vessel of the United States, of these facts; and advised him to seize and detain the vessel until this government could be advised of the facts, and direct what course should be adopted. The advice of Mr. Trist was pursued, and Captain McKenney took possession of the brig Thomas, while in the port of Havana. The vessel was of Spanish build, and was manned entirely (the captain excepted) by foreigners; and the number of men on board was much greater than is usually employed in navigating a vessel of the size of the brig Thomas. These were circumstances, in addition to the fraudulent character of the papers, calculated to excite strong suspicions that the vessel was destined for some unlawful enterprise, and probably for the slave trade.

A correspondence ensued between the Captain General of Cuba and Mr. Trist, which terminated in a friendly disposition of the question, whether the seizure of the vessel in the port of Havana was a violation of the jurisdictional rights of Spain. Upon that point, now adjusted and settled, I wish to be understood as expressing no opinion.

Upon another point which presents itself it is proper that I should say, that, let the question discussed between the Captain General of Cuba and the consul of the United States be as it may, so far as relates

to Captain Howell and his vessel the proceedings were lawful, and Captain Howell has no cause of complaint. Suppose the Spanish authorities had given their consent to the seizure before it was made; then, what legal rights would have been violated? None, that I can perceive, (407) more than if the seizure had been made on the high seas. In this case, the consent of the Spanish authorities was not obtained before the seizure; but this could only make the act wrongful, if the captain general was correct in his view of the public law, so far as the Spanish authorities and Spanish rights were concerned. It would not make the seizure wrongful, so far as relates to Captain Howell and his vessel. If an officer, in executing civil process, shall break open the house of the defendant and arrest him, the officer is subject to an action and to damages for breaking the house; but the arrest is good.

I refrain from any argument showing the inapplicability of the principles of the public law in reference to the protection of vessels in the ports or waters of a friendly power, when that protection is claimed by a vessel of the United States against their public vessels, acting in conformity to, and in connection of, the laws of congress.

I am, sir, &c., &c.,

FELIX GRUNDY.

To the Secretary of State.

Vol. III. p. 532 (Gilpin)

VERIFICATION IN FOREIGN COUNTRIES OF APPLICATIONS FOR PATENTS FOR INVENTIONS

Verifications and depositions in foreign countries to be made under the provisions of the sixth section of the act of July 4, 1836, before patents can issue, should not be made before consuls, but before competent magistrates of the country where they shall be taken, and authenticated by the consul.

Any abrogation of oaths in the patent laws of England will not affect the question here; all conditions requisite to a patent in this country must be complied with according to the laws of congress.

Attorney General's Office,
May 12, 1840.

Sir: I had the honor to receive your letter of the 4th inst, enclosing a communication from the Commissioner of Patents, and asking whether, in my opinion, the oath required to be taken by an applicant, under the provisions of the sixth section of the act of the 4th of July, 1836, before a patent can be issued to him, may be administered by a consul of the United States, and particularly the consul who is also an agent of claims at Paris.

In reply, I have to state that I am aware of no law which confers on consuls the general power of administering oaths, though they are authorized to *authenticate* depositions made in foreign countries. I am, therefore, of the opinion that the oath should not be administered by the consul, but by a competent magistrate of the country where it is taken; and that the deposition so made should be verified by the official certificate or authentication of the consul.

The Commissioner of Patents also inquires whether the provision of the act of the 4th of July, 1836, above referred to, is "sufficiently complied with in *England*, by a solemn declaration" pursuant to the act of 6 William IV, entitled "An act to repeal an act of the present session of parliament, entitled 'An act for the more effectual abolition of oaths and affirmations taken and made in the various departments of the state, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extrajudicial oaths and affidavits; and to make other provisions for the abolition of unnecessary oaths.'" I have not seen the British statute here referred to, but presume, from its title, that it substitutes, in cer- (533) tain cases in England, a declaration for the oath or affirmation previously required by the laws of that country. I am of opinion that this change cannot sanction any deviation from the requisitions of the act of congress above referred to, and that the question proposed must be answered in the negative.

H. D. GILPIN.

To the Secretary of War.

Vol. III. p. 683 (Legare)

AID TO DISTRESSED SEAMEN

Seamen on board vessels of war are not entitled to pecuniary assistance from consuls abroad, under the act of 28th February, 1803.

The moneys in the hands of the secretary of state were raised from the wages of merchant seamen only, and should be applied only for the relief of that class of seamen which have contributed to the fund.

Office of the Attorney General,
October 27, 1841.

Sir: In compliance with the request contained in your note of the 25th instant, that I would give you my opinion on the construction of the 4th section of the act of congress of February 28, 1803, in reference to the rendering pecuniary assistance by the consuls abroad to distressed seamen left at their consulates by United States vessels of war, I have the honor to state that, after a conversation with the Fifth Auditor as to the practice of the department, and on collating

carefully all the acts having reference to the subject in question, I have been convinced, notwithstanding a strong first impression to the contrary, that the fund in the hand of the secretary of state is appropriated to providing for destitute merchant seamen only.

The act of 1803 must be read with the act of 1792, to which it is merely supplementary, and with the act of 1814, (chap. 161, 2 Story, 1432.) The result is, that the fund which your department is authorized to dispose of is charged with a special trust, as it is raised in a special way—by deductions out of the wages of merchant seamen. The public service is subjected to rules of its own; and the administration of it, throughout all its interests, is committed to the secretary of the navy. The words of the 4th section of the act of 1803 are, it is true, very general and comprehensive, but they must be interpreted according to the subject matter; and that limits and qualifies them as above.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Fletcher Webster, Esq., Acting Secretary of State.

OBLIGATION OF SHIP-MASTERS TO BRING HOME DESTITUTE SEAMEN

The act of 1803, requiring masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, to take, at the request of the consul, destitute seamen on board, and to transport them to the port of the United States to which such vessels may be bound, is limited to such vessels as shall be bound from the port where the request is made, direct to some port of the United States.

To require all American vessels in foreign ports, whether bound directly to some port of the United States or not, to receive destitute seamen, would be in many cases very oppressive upon masters and owners.

Attorney General's Office,
July 10, 1843.

Sir: I have carefuly examined and considered the provisions of the act of the 28th of February, 1803, and the letter of the United States consul at Valparaiso, respecting the refusal of Captain Theodore Perry, master of the brig "Phillip Hone," to receive on board of said bring two destitute American seamen to be conveyed to the United States, transmitted to me on the 8th instant, upon which you desire my opinion——whether, first, it is the intention of the law that masters of vessels should be required to transport destitute American seamen, as provided by said act, only when such vessels are bound direct to some port of the United States? and, secondly, whether, under

circumstances such as those attending the refusal of Captain Perry, they are not under an obligation to comply with the consul's request?

The 4th section of the act of 1803 was designed to supply the 7th section of the act of 1792, ch. 94, to provide a compensation to masters who should be required to perform the duties it imposes, which the act of 1792 did not afford, and to fortify (186) the sanction by which it was to be enforced, by an increase of the penalty demanded for its violation. The only other act of congress relating to the subject is that of 1811, ch. 95, which provides for the allowance by the comptroller in certain cases of additional compensation.

I do not find that these provisions have been at any time the subject of judicial examination; the answers to your inquiries must, therefore, be sought in the terms of the laws referred to. These I think susceptible of but one interpretation. The language of the act of 1803, borrowed from that of 1792, is, that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are required and enjoined to take such mariners or seamen on board of their ships or vessels at the request of the said consuls, &c., and to transport them to the port of the United States to which such ships or vessels may be bound, &c. The act does not impose the duty of transportation upon every American vessel found in a foreign port. For obvious reasons, such a requirement might, under many circumstances, operate the most oppressive inconvenience upon masters and owners. But the provision is limited in its application to such vessels found in a foreign port as shall belong to citizens of the United States, and as shall be bound to some port thereof. Bound whence? From the port at which such vessel may be found—not from a port to which she may be first bound—and thence to some port of the United States. Such a construction would apply the provisions of the act to every vessel belonging to citizens of the United States whereever bound, if destined ultimately to return home.

I am of the opinion, therefore, that the act of 1803 does not require that masters of vessels should transport destitute American seamen, except in cases in which such vessels are bound direct to some port of the United States.

The second inquiry, as to the particular case of Captain Perry and the extent of his obligations, it is not easy satisfactorily to answer, because of the defect in the information upon which it is suggested. The circumstances connected with his refusal are so generally stated, as to render it difficult to determine whether the voyage to Coquimbo was merely colorable or (187) contemplated in good faith, and whether it was an intermediate port at which the vessel was to touch

or call, or a port of *bona fide* destination. It is quite clear that in the one case the duty of the master would have been to transport the seamen; in the other, if my answer to your first question be right, the law imposed on him no such obligation.

Under all the circumstances of the case, I would respectfully suggest that the transaction offers an occasion which may be advantageously embraced by an appeal to the judicial department of the government to settle the construction of a law, upon the rigid enforcement of which many and important interests depend.

I have the honor to be, sir, your obedient servant,

JOHN NELSON.

Hon. A. P. Upshur, Secretary of State.

Vol. IV. p. 390 (Mason)

SHIP-MASTERS ABROAD—WHEN TO DEPOSIT REGISTERS WITH CONSUL

The 2d section of the act of 28th February, 1803, does not require the papers of an American vessel in a foreign port to be delivered to the consul, except in cases where it is necessary to make an entry at the custom-house.

A requisition of a deposit of papers, in all cases of arrival where, by the local laws, an entry is not necessary, and where there is no trading or purpose to trade, might add to consular emoluments, but would be embarrassing to the interests of navigation.

Attorney General's Office,

June 11, 1845.

Sir: I have had the honor to receive your communication of the 16th April last, with a letter from the United States consul at Nassau, asking my opinion on the question presented by the consul. He states that his instructions to his agents have been to this effect: "That any voluntary arrival at their ports obliges the master of the vessel, upon his arrival, to deposit his register, whether such arrival be for advices or not, or whether the vessel comes to an entry or not, and without respect to her remaining twenty-four hours, or any definite time or not." And the question presented for consideration is, are those instructions warranted by law? By the 2d section of the act of 28th February, 1803, it is made the duty of every master of a vessel belonging to citizens of the United States, who shall sail from any port of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, or Mediterranean passport, with the consul, vice-consul, or commercial agent, if any there be at such port. In case of refusal or neglect, he is subjected to a penalty of five hundred dollars. And the same section makes it the duty of such consul, vice-consul, or commercial agent, on such master or commander pro-

ducing to him a clearance from the proper officer of the port where his ship or vessel may be, to deliver to the said master or commander all of his said papers.

Taking the whole section together, it is very obvious that congress required the papers of an American vessel in a foreign port to be delivered to the consul only where it was necessary to make an entry at the custom house. It is on the master's producing a clearance, that the consul is to return from him his pa- (391) pers; and there can be no clearance where there is no entry. If an American vessel arrive at her port of discharge, or for any reason other than the purpose of trading with the whole or portion of her cargo, she shall remain so long as, by the law of the country, to require it, she must enter at the customhouse of such port; and, in all such cases, the master must deposit his register. But the law does not extend the duty beyond this. A requisition of a deposit of papers, in all cases of arrival where, by the local laws, an entry is not necessary, and where there is no trading or purpose to trade, might add to consular emoluments, but would prove extremely embarrassing to the navigating interest. The object of the law is to compel masters of vessels belonging to American owners, sailing from American ports, to respect our own laws, and those of the foreign countries to whose ports they may go for the purpose of trade; and this object is attained by requiring them to exhibit the evidences of their being lawful traders to our consuls at the ports where they have to enter. Beyond this, neither the law nor good policy requires that their duty shall extend.

I have the honor to be, respectfully, sir, your obedient servant,

J. Y. MASON.

Hon. James Buchanan, Secretary of State.

Vol. V. p. 161 (Johnson)

WHEN SHIP-MASTERS ARE REQUIRED TO DEPOSIT REGISTERS WITH CONSULS

Masters of American vessels entering foreign ports where there shall be an American consul, and remaining so long as that, by the local regulations, they are required to enter, and afterwards to clear in regular form, are required to deposit their registers, &c., with such consul, irrespective of the purpose for which the port shall have been entered. (See opinion on this subject delivered by Attorney General Mason on the 11th of June, 1845.)

Attorney General's Office,
September 26, 1849.

Sir: The question you have submitted to this office, upon the letter of F. H. Whitmore, Esq., of New Haven, Connecticut, of the

10th September, 1849, "respecting the demand made by the United States commercial agent at St. Thomas, in all cases of the arrival at that port of an American vessel, whether business is or is not done by her, that the register, &c., be deposited with him," I have considered.

The legality of the demand depends upon the proper construction of the 2d section of the act of congress of the 28th February, 1803, "supplementary to the act concerning con- (162) suls and vice-consuls, and for the further protection of American seamen." (2 statutes at large, 203.)

By the words of the first part of the section, the master of an American vessel sailing from a port in the United States is required to deposit "his register, sea-letter, and Mediterranean passport," "upon *his arrival* at a foreign port," with the American consul, &c., if there be one at such port. The duty, regarding this part of the section, only exists upon arrival, without reference to its object, and whether it be voluntary and for business, or otherwise. But the subsequent part qualifies, I think, the general words of the first. It is in the provision that the consul, &c., on the master's "producing a clearance from the proper officer of the port where his ship or vessel may be," shall deliver to him "all of his said papers." Construing the two classes together, I think the true meaning of the whole is, that there is to be no deposit of the papers, upon an arrival, unless it be an arrival *with a view to entry, or where, by the local law, an entry is required.* Where either exists, my opinion is, the deposit with the consul, &c., is to be made, and, of course, that it is the duty of the consul to demand it.

It will be seen, I think, that, in this view of the act, I but concur in the opinion to which you refer, of Mr. Attorney General Mason, of the 11th of June, 1845.

After quoting the section of the act in question, he says: "Taking the whole together, it is very obvious that congress required the papers, &c., to be delivered to the consul *only* when it was necessary to make an entry at the custom-house;" and, therefore, "if an American vessel arrive at her port of discharge, or, for any reason other than the purpose of trading with the whole or portion of the cargo, *she shall remain so long as, by the law of the country," &c., "she must enter at the custom-house of such port,"* and the deposit must be made.

Interpreting the section, as I do, to require the deposit only when an entry is to be made, he makes it the duty of the master, as I do, to deposit, in case of entry in fact, without regard to the reason or object of its being made. The motive for the deposit is, I think,

the same in all cases of actual (163) entry, and the trouble and duty of the consul, &c.,the same. He is in both cases to take charge of the vessel's papers, and to hold them until she is again cleared; and, for the trouble of receiving, preserving, and delivering them, (of each of which acts he is to give a certificate under seal,) he is entitled to charge two dollars. (See chapter 8, section 7, of General Instructions to Consuls, of the 6th June, 1849.)

The result, then, to which I come, is this: that the commercial agent at St. Thomas, in the case of all American vessels arriving there, and remaining so long as, by the local regulation, to be obliged to enter and afterward to clear, is entitled, and it is his duty to demand the surrender of their papers, under the act of 1803, no matter what may be the motive of the entry, whether business or not.

I have the honor to be, very respectfully, sir, your obedient servant,

REVERDY JOHNSON.

Hon. John M. Clayton, Secretary of State.

Vol. VI, p. 617 (Cushing)

POWERS OF CONSULS—LIABILITIES OF THE UNITED STATES

Consuls have no authority to order the sale of a ship in a foreign port, either on complaint of the crew or otherwise.

If, on such sale, a consul retains money for the payment of seamen's wages, he acts at his own peril, and is responsible to the owners.

The United States are not responsible in damages for moneys illegally received by consuls, or for any other act of malfeasance of theirs in office.

Attorney General's Office,
July 24, 1854.

Sir: Your letter of the 12th inst. calls for my opinion of the acts of February 28th, 1803, and July 20th, 1840, in relation to the powers and the duties of consuls of the United States, as applied to the case of the bark "Serene," sold by the order of the consul at Acapulco.

This act of February, 1803, (ii Stat. at Large, p. 203, chap. 9, sec. 3,) makes it the duty of the master or commander of a ship or vessel belonging to a citizen of the United States, which "shall be sold in a foreign country, and her company discharged, ... to produce to the consul or vice consul ..... the list of his ship's company, certified as aforesaid, and to pay to such consul or vice-consul, ... for every seaman or (618) mariner discharged, being on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two-thirds thereof to be paid by such consul ..... to each

seaman or mariner so discharged, when, etc., ... the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen, who may be destitute, and may be in such foreign port,"—the same to be accounted for every six months with the secretary of the treasury.

The act of July 20th, 1840, entitled "An act in addition to the several acts regulating the shipment and discharge of seamen and the duties of consuls," (Vol. v of Stat. at Large, p. 396, chap. 48, article 12th,) provides, "If the first officer, or any officer, and a majority of the crew of any vessel shall make complaint in writing that she is in unsuitable condition to go to sea, because she is leaky or insufficiently supplied with sails, etc., or the crew is insufficient to man her, or that her provisions are not or have not been during the voyage, sufficient and wholesome, thereupon the consul or commercial agent, in any of these or like cases, shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall in their report state what defects and deficiences, if any, they find to be well founded, as well as what ought to be done, in their judgment, to put the vessel in order for the continuance of the voyage."

Art. 13th gives the inspectors full power to examine the vessel, and also to hear and receive any other proofs, and the consul, upon view of the report of the inspectors so appointed, may approve the whole, or any part of the report. If he approve he shall so certify; if he dissent, he shall certify his reasons for so dissenting.

Art. 14. "The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident, and in case it was by neglect or design, and the consul or other commercial agent ap- (619) proved of such finding, he shall discharge such of the crew as require it, each of whom shall be entitled to three months' pay in addition to his wages to the time of the discharge; but if, in the opinion of the inspectors, the deficiences found to exist have been the result of mistake or accident, and could not in the exercise of ordinary care have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge."

By the papers accompanying your letter, it appears that the

American bark "Serene," Phineas Windsor, master, of 332 44-95 tons burthen, sailed from San Francisco, in the state of California, on the 23d of March, 1854, for San Blas, in the republic of Mexico, laden with a cargo of quicksilver, thence, after discharging her cargo, she sailed to Ypala, in that republic, and there took in a full cargo of Brazil wood, and thence cleared and sailed on the 2d of May, bound for Valparaiso, in Chile. The vessel at sea sprang a leak on the 6th of May, and put into Acapulco in distress.

There, the master went before the American consul, Charles L. Denman, and made declaration and protest of all the circumstances; which protest and declaration was also verified by A. D. Stagg, first officer, T. W. Pinkham, carpenter, Charles Foy, Thomas Tilson, and John Chalet, seamen.

On the 12th of May, the first and second mates, the carpenter, and said three seamen, presented to the consul their petition in writing, requesting him to appoint a survey and examination of said vessel, and to take such action thereon as is provided by law.

The captain deposed that the said petitioners composed two-thirds of the officers and crew of the said vessel the "Serene."

Thereupon the consul appointed C. Hayward, a sea captain, Thomas Campbell, a ship carpenter, and Lorenzo Pratt, a pilot, to examine into the condition of said vessel, etc., and make report.

They reported that after discharging the cargo, the leak was (620) below the water line, the result of heavy seas, without fault of the officers or crew; that the vessel must be stripped, hove down, and her copper taken off, in order to [make] a thorough examination and repair; that even if she could be repaired in the port of Acapulco, the expense of the delay would exceed the value of the vessel; but that she could not be repaired in that port. And the said examiners and inspectors advised that the vessel be sold for the benefit of all concerned, and that measures be taken for the safety of the cargo: all which was sworn before the consul, who certified his approval of the report on the 20th of May, 1854. The vessel was accordingly sold at auction on the 22d of May, 1854, *by order of the consul,* and produced the sum of $1332.68.

The vessel being so sold, in this foreign port, the consul paid out of the proceeds to the crew, (whose wages were stated at so much per month in the shipping articles,) viz: To the first and second mates, the carpenter, and the five seamen, who composed the crew, the sum of $286.77, for their wages up to the 22d of May, 1854,—and took their receipts, severally,—to the master, as paid by the consul;—and the consul furthermore gave his receipt to the master for the sum of $495, for three months' wages to the first and second mates,

to the carpenter, and to seaman Chalet, they being the only American citizens of the ship's roll; besides which the consul paid the various expenses of the survey of the vessel and sale in the port of Acapulco, amounting, in wages and expenses, to the full proceeds of the sale.

There was insurance upon the vessel, but none on the cargo. The assurers refuse to pay the wages, because, they say, no wages were earned by reason of the disaster before the vessel arrived at Valparaiso, whereby the voyage was broken up,—the vessel being condemned and sold, by order of the consul, and not by voluntary abandonment and sale by the master.

Thereupon the master inquires—

1st. Whether the wages were due?

2d. Whether the government will refund the money illegally received by the consul?

1. The first question is divisible—1st, as to the wages upon (621) the voyage from the port of San Francisco to the port of San Blas; 2d, as to the wages on the voyage from San Blas or Ypala to Valparaiso.

Seamen in merchant ships are usually hired at a certain sum, either by the month, or for the voyage. In the former mode, the sum of wages depends upon the length of the voyage; in the latter case it is fixed invariably without regard to the duration of the voyage. In this case, it appears the sum of wages depended upon the duration of the voyage, being rated by the month.

The general rule is that the wages of seamen on board of merchant ships are payable out of the earnings for freight; and if no freight is earned by reason of the perils of the sea, or capture by the enemy, and not by the fault or neglect of the master or owner, no wages are due. Freight is the mother of wages. (Hernaman v. Bawden, etc., iii Burr. 1844; Abernethey v. Sandale, ii Douglass, 542.)

But it seems to be settled that, where a voyage is divided by various ports of delivery, a claim for proportional wages attaches at each of such ports of delivery, upon safe arrival, and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds, or by contracts inserted in the body of the shipping articles, not usual, not fully explained to these illiterate and inexperienced persons, are ineffectual and void. (Anonymous, 1. Ld. Raym. 639, and also Anon., Ibid. 739; Comyns' Dig., Merchant (F. 2.) 4th edit. vol. 5, p. 56; the Two Catherines, 2 Mason's Circuit Court Rep. 319-329; Thompson v. Faussat, 1 Peters' Cir. Ct. Rep. 182; Judge Winchester's decisions, re-

ported in note to Relf v. The Maria, 1 Peters' Admiralty Rep. 186; Crammer v. Gernon, 2 Peters' Adm. Rep. 390; Kent's Comm. vol. iii, p. 190-191, Lecture 46, Abbott on Shipping, part iv, chap. 2, p. 417, and note 2; Moore v. Jones, xv Mass. Rep. 424; Hooper v. Perley, xi Mass. Rep. 545; Swift v. Clark, xv Mass. Rep.173.)

The principles of these decisions entitle the crew of the "Serene" to wages up to the time she sailed from Ypala, after having discharged her cargo to San Blas.

(622) But they were not, because of the voyage to Valparaiso being broken up, entitled to wages from and after the time the vessel sailed from Ypala.

Next, as to the three months' wages, charged because of the proceedings and sale so ordered by consul at Acapulco.

The act of the 28th of February, 1803, applies only to voluntary sales by the master in foreign ports, or by the owners, and not to a case where a sale is rendered necessary by a shipwreck. (The Dawn, Ware, 488; Pool v. Welsh, Gilpin, 193; Abbott on Shipping, p. 193, note 1; The Saratoga, 2 Gallison, 181.)

In its 12th, 13th, and 14th articles, the act of 20th July, 1840, applies to a case where a vessel, having arrived at a foreign port, is about to sail thence on another or continuous voyage, and the crew apprehend that their lives will be endangered because of her unsuitable condition to go to sea, and make complaint to the consul of such intention to go to sea in an improper and unsuitable condition,—"because she is leaky; or insufficiently supplied with sails, rigging, anchors, or any other equipment; or that the crew is insufficient to man her; or that her provisions, "stores and supplies are not, or have not been during the voyage, sufficient and wholesome."

Upon complaint in any of these or like cases, the consul shall appoint fit persons "to examine into the causes of complaint;" to examine the vessel, and whatever is on board, and to receive any other proof.

The examiners are to state whether, in their opinion, "the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design." If the inspectors find any complaint "well founded;" they are to state what ought to be done "to put the vessel in order for the continuance of her voyage." They have no authority to report a sale; the crew have no authority to ask a sale; this act gives no authority to the consul to order a sale of the vessel.

By the 14th article of this act, if the examiners report that "the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, "and the (623) consul approves of such finding, "he shall discharge such of the crew as require it.

In such case of neglect or design, the crew, discharged upon such ground, are each entitled to three months' pay, in addition to his wages up to the time of the discharge."

If the deficiency complained of by the crew is reported by the examiners to have been "the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall in a reasonable time remove or remedy the causes of complaint, then the crew shall remain and discharge their duty." But if the master does not, in a reasonable time, remove or remedy the causes of complaint, then the crew shall, upon request, be discharged; and in this latter case they shall receive each "one month's wages in addition to the pay up to the time of the discharge."

This act has not deprived owners and masters of vessels of the right to consult their own interests, in selling or not selling; it has not subjected vessels to consular orders of sale because of such vessels having, in their voyages, sprung a leak and put into the nearest port for safety.

It intends to redress the just complaints of the crews of vessels in foreign ports against being compelled to risk their lives in vessels about to go to sea in unsuitable, unsafe conditions; to hear and redress the just complaints of mariners against being exposed to peril by the neglect or design of masters and owners, or by their mistakes or accidental omissions. If the complaint exhibited to the consul, upon examination, is found to be just and to have been the result of neglect or design, then the mode and measure of redress are pointed out, the crew may be discharged from further service, and have three months' pay in addition to his wages up to the time of discharge." If the complaint is found to be true, but to have been the result of mistake or accident, the act points out the mode and measure of redress. "The master shall in a reasonable time remove or remedy the causes of complaint, and then the crew shall remain and discharge their duty. But if the master shall not in a reason- (624) able time remove or remedy the causes of complaint, then the crew, upon their request, shall be discharged, "and receive each one month's wages in addition to the pay up to the time of discharge."

The powers of the consul are confined to the examination of complaints of the crew against the master, as that he is about to take the crew to sea in a vessel, which is "in an unsuitable condition to go to sea, because she is leaky or insufficiently supplied "with sails, rigging, etc.—"or that the crew is insufficient," or that her "provisions, stores, and supplies are not, or have not been, during the voyage, sufficient and wholesome." The powers of the consul extend no

further than to discharge the crew with their extra wages in addition to the pay up to the time of discharge.

That a vessel is about to sail out of port in a leaky condition, is a just cause of complaint by the crew, which the master may be directed to remove or redress in a reasonable time; but it is no just cause of complaint against master or owners that, by the straining of the vessel in heavy seas, she has sprung a leak.

Upon due examination of this act, it cannot be tortured into an authority to the crew of the vessel to lodge complaint against the master, because the vessel has sprung a leak, by reason of her laboring in heavy seas, and has, therefore, to put into the nearest port for safety.

In this case, the crew themselves deposed before the consul that the leak was caused at sea, while the vessel was on her voyage, by heavy rolling seas, and "not to be attributed to any insufficiency of the said bark, or default of him, the said master, his officers and crew." And yet, after these affidavits before the consul, showing the cause of the disaster, and why the vessel could not proceed to Valparaiso, but was by distress compelled to put into the harbor at Acapulco, the consul entertained the mere application of the crew for a survey to examine into the condition of the bark, without a solitary complaint against the master or owners; and after the examiners had reported that the leak "was the result of, or occasioned by, heavy seas, and that no fault can be attributed to her officers or (625) crew, as she appears to have been well provided with all things necessary for her voyage," the consul ordered a sale of the vessel at auction; and then distributed the proceeds, all of which, by his account rendered, were swallowed up by expenses and three months' wages to the crew in addition to their pay to the time of the sale.

The act of 1840 does not change the general principle of the maritime law, that seamen's wages are not due for a voyage not performed, when no freight has been earned, when the voyage has been broken up by a disaster at sea, and when no fault is attributable to the master or owners.

Nor did it put it into the power of the crew, when the vessel was obliged by a leak, caused by the straining of the vessel in heavy rolling seas, to put into the nearest port for safety, and so disabled from continuing the voyage until repaired, to complain of the master for such an event, cause the vessel to be sold, and thereby acquire profit to themselves by the payment of wages not earned, and the further advance of pay for three months to come.

In my opinion, therefore, the payment of wages by the consul to the crew for the time after the ship, having previously discharged her cargo at San Blas, sailed from Ypala, and down to the time of

the sale, as also the detention of wages for three months in addition, was an illegal act.

Indeed, no power is given to the consul, by this act of congress or any other, upon complaint of the crew or otherwise, to order a sale of the vessel, and it does not appear upon what authority he assumed so to do in the present instance.

Provision is made by the law or the regulations of most countries of Europe and America for the case of the ascertained unseaworthiness of merchant ships on a voyage, and the consequent jurisdiction of the consul for the disposition on security of the property, and the payment of wages due the seamen.

Thus the French "Code de Commerce," (art. 237,) while, in general, forbidding the master of a merchant vessel to sell her abroad unless he have a power of attorney from the owner, yet empowers him to do this, in case of the innavigability of (626) the ship lawfully ascertained, and *with permission of the consul.* But it gives no power to the consul to order the sale *in invitum.* (Pardessus, Droit Commercial, tome vi, p. 260-261; Moreuil, Manuel des Agents Consulaires, p. 85-86.)

So, in the consular regulations of Denmark, the consul is authorized to make sale of a disabled ship when the owner has on the spot no agent or attorney, but not otherwise; and even then he must, if possible, send and obtain the consent of the owner. (DeCussy, Réglements Consulaires, p. 411.)

No act of congress gives to an American consul power to make a forced sale of a ship, because of innavigability, except that of April 14th, 1792, which expressly excludes the authority of the consul to sell either ship or goods "when the master, owner, or assignee thereof is present or capable of taking possession of the same." (i Stat. at Large, p. 283.)

Upon the face of the documents, the sale was ordered by the consul as of his own authority. If so, it was wholly illegal, especially the master, who was part owner, being present. It was possible, however, that the master assented to, or by some writing not filed authorized, the sale; for it is a suspicious fact in this part of the case, that the papers do not show to whom the sale was made, and that, as already intimated, the several surveys, fees of consul, seamen's wages, and other charges, consumed all the proceeds of the sale in the hands of the consul.

As to these and the other acts of the consul, in so far as he may have exceeded his authority, the United States are not responsible:—excepting only that if, upon such forced sale of the vessel, caused by the consul, he has retained one-third of the wages of the seamen as

a fund for the payment of the passages of seamen citizens of the United States desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, as directed by the 3d section of the act of 28th February, 1803, in cases of voluntary sales of American vessels in foreign ports, —and if he shall have paid into the treasury, or legally expended to the use of the United States, any portion of the money, so received by mistake and misconstruction of the law,—then such portion so expended to the use (627) of the United States, ought to be refunded to the owners of the bark "Serene."

I am, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

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CELEBRATION OF MARRIAGES BY CONSULS

Consuls of the United States have no lawful authority as such to solemnize marriages in countries comprehended within the pale of the international public law of Christendom.

Secus, in countries not Christian, where by convention or in fact the rights of exterritoriality are possessed by citizens of the United States.

Attorney General's Office,
November 4, 1854.

Sir: Your communication of the 3d instant states that it is the practice, to some extent, of the consuls of the United States abroad to marry parties, either citizens of the United States or not, and this without observance of the laws of the particular place regarding marriage,—and suggests the inquiry whether such marriages are valid in the United States, either as to the personal *status* of the parties themselves and their issue, or as to any of the rights of property depending on the matrimonial relation.

This inquiry belongs to international law *private*, as distinguished from international law *public:* that is to say, it regards, not the relations of nations among themselves, but the relations of individuals to the laws, civil or criminal, of different nations. (Foelix, Dr. Int. Privé, tit. Prél.)

The different states of Christendom are combined, by religious faith, by civilization, by science and art, by conventions, and by usages or ideas of right having the moral force of law, into a community of nations, each politically sovereign and independent of the other, but all admitting much interchange of legal rights or duties.

(Vattel, Droit des Gens, Prél. s. 11; Wheaton's Elements, p. 40; Garden, Code Dip. de l'Europe, tom. i, Int. p. 3.)

As between themselves, the general rule of public law is, that each independent state is sovereign in itself, and has more or less complete jurisdiction of all persons being, matters happening, contracts made, or acts done, within its own territory. (Kluber, Droit des Gens, s. 21 and passim; Story's Conflict of Laws, ch. 2.)

I say more or less complete, because, although each nation (19) possesses its territory as its own, and exercises jurisdiction within itself, not only as to persons, whether subjects or foreigners, their acts and their property therein, and in general neither claims itself, nor concedes to others, external jurisdiction, yet each yields to the other certain reciprocal rights within itself, which are sometimes denominated by the civil law term of servitudes of the public law or law of nations. (Martens, Précis, s. 83.)

These privileges, servitudes, or easements of public law have grown up either by express convention, or by usage founded on consent. Per Ch. J. Marshall. The Exchange, vii Cranch, p. 136.) Among them are the effect, which, in certain cases, one state concedes to the laws of another in regard to contracts made in the latter, and the reciprocal rights conceded of personal residence or commercial intercourse, and of the interchange of ministers and consuls; which concessions modify, to a certain degree, the hypothetical completeness of the internal sovereignity of each nation.

Hence, in discussions of private international right, the fundamental and all-prevading distinction between the statute personal, or the laws of one's own proper domicil, and the statute real, or the laws which are independent of the person, and which regulate in a foreign country his acts or interests irrespective of his domicil. The personal statute is transitory, and follows the person; the real statute is chiefly confined to things, which it controls only in the *locus rei sitae*, or the given territory. (Dalloz, Dict. Juris. s. v. Loi Pers.; Proudhon, Des Personnes, tom. i, p. 8.)

To the regular jurisdiction, however, of each country over persons, things, and acts being or done within it, there exist, by received public law, certain absolute exceptions. These exceptions are the several cases of exterritoriality: That is, the various conditions in which a person, though abroad, is exempt from the foreign jurisdiction, and is deemed to be still within the territory and jurisdiction of his own country.

The doctrine of exterritoriality is denounced by some speculative publicists as if it were a mere fiction of law. (See Pinheiro Ferreira, Droit Public tom. ii, p. 197.) This view of the (20) matter is super-

ficial, for it is only a cavil as to the name; and erroneous, because it argues upon the name, and not the thing which it represents.

The word "exterritoriality" is a sufficiently definite technical designation for the peculiarity of legal condition already defined as attaching to certain persons in a foreign country, to wit, the case of an actual sovereign of an independent state, his person, suite, residence, and furniture, while he resides or sojourns peaceably in a foreign country; a foreign army, whether in peace or war; a ship of war generally, and sometimes a merchant ship, in a foreign port, and either of them on the high seas, in all circumstances; and a foreign ambassador. (Wheaton's El., p. 139.)

In all these cases, and expressly in that of foreign ministers, the privilege of exterritoriality extends to the residence as well as the person of the foreign minister, and to certain legal acts performed in his presence. (Vattel, 1. 8, ch. 7, 8, 9; Kluber, s. 204; Martens, Précis, 1. 7, ch. 5; Foelix, liv. 2, tit. 2, ch. 2, s. 4; Ch. de Martens, Guide Diplomatique, ch. 5.)

Such are the rights of an ambassador or other foreign minister. But, although consuls are not merely commercial agents, as many authors assert, (Wicquefort, Ambos., vol. i, p. 133; Bynkersh. de F. Legat., p. 165; Wildman's Institutes, p. 165;) and although they undoubtedly have certain of the qualities and some of the rights of a foreign minister, (see De Cussy, Réglements Consulaires, sec. 7;) still it is undeniable that they do not enjoy the privileges of exterritoriality, according to the rules of public law received in the United States. (Clark v. Cretico, i Taunton, 106; The Anna, iii Wheaton, 446; United States v. Ravara, 11 Dallas, 297; Viveash v. Beeker, iii Maule & Sel. 284; Barbuit's Case, Cases Temp. Talbot, 281; Commonwealth v. Kestoff, v. Serg. & R. 54; Durand v. Halback, i Miles, 46; Davis v. Packhard, vii Peters, 276; S. C., vi Wend. 327; S. C., x Wend. 50; Flynn v. Stoughton, v. Barb S. C. R. 115; State v. De la Foret ii Nott & M. 217; Mannhard v. Soderstrom, i Bin. 138; Hall v. Young, iii Pick., 80; Sartori v. Hamilton, i. Green's R. 107.)

In all the adjudged cases above cited, it is either ex- (21) pressly ruled, or the point presented assumes, that consuls are subject to the local jurisdiction. The same doctrine is recognized in the modern law treatises of authority, whether in the United States or in Great Britain. (Wheaton's Elements, p. 293; i Kent's Com., p. 43; i Wildman's Inst., p. 130; Flynn's Brit. Consuls, ch. 5.)

Notwithstanding the somewhat vague speculations of Vattel and some other continental authors on the question whether consuls are quasi ministers or not, (Vattel, Droit des Gens, l. iv. ch. 8; De Cussy, Réglements Consulaires, sec. 6; Moreuil, Agents Consulaires,

p. 348; Borel, Des Consuls, ch. 3,) it is now fully established by judicial decisions of the continent, and by the opinions of the best modern authorities there, that consuls do not enjoy the diplomatic privileges accorded to the ministers of foreign powers; that in their personal affairs they are justiciable by the local tribunals for offences, and subject to the same recourse of execution as other resident foreigners; and that they cannot pretend to the same personal inviolability and exemption from jurisdiction as foreign ministers enjoy by the law of nations. Foelix, l. ii, tit. 2, chap. 2, s. 4; Dalloz, Dic. de Jurispr., tit. Agents Diplomatiques, no. 35; Ch. de Martens, Guide Diplomat., s. 83.)

In truth, all the obscurity and contradiction as to this point in different authors arise from the fact that consuls do unquestionably enjoy certain privileges of exemption from local and political obligation; but still these privileges are limited, and fall very far short of the right of exterritoriality. (Massé, Droit Commercial, tom. i, nos. 438, 439.)

Thus, in the United States, consuls have a right, by the constitution, to the jurisdiction of the federal courts as against those of states. They are privileged from political or military service, and from personal taxation. In some cases we have by treaty given to consuls, when they are not proprietors in the country, and do not engage in commerce, a domiciliary and personal immunity beyond what they possess by the general public law; and the extreme point to which these privileges have been carried in any instance may be seen in the consular (22) convention of the 23d of February, 1853, between the United States and France. (x Stat. at Large, p. 992.)

Having premised this explanation of the exact *status* of consuls by the law of nations, it remains for me to deduce from the general doctrine the particular conclusions applicable to the special subject of inquiry.

In regard to the contract of marriage, the general principle in the United States is, that, as between persons *sui juris*, marriage is to be determined by the law of the place where it is celebrated. If valid there, then, although the parties be transient persons, and the marriage not in form or substance valid according to the law of their domicil, still it is valid everywhere:—with some exceptions, *perhaps*, of questions of incest and polygamy. If invalid where celebrated, it is invalid everywhere. (Story's Conflict of Laws, s. 113; Bishop on marriage, s. 125.)

The only exceptions to this last proposition, namely, that marriages not valid by the *lex loci contractus* are not valid anywhere else, are, first, in favor of marriage, when parties are sojourning in a

foreign country where the law is such that it is impossible for them to contract lawful marriage under it. Secondly, in certain cases in which, in some foreign countries, the local law recognizes a marriage as valid when contracted according to the law of domicil. Thirdly, where the law of the country goes with the parties, that is, in the contingency of their personal exterritoriality, as in the case of an army and its followers invading or taking possession of a foreign country, (Ruding v. Smith, ii Hag. C. R., 371; Huber. Praelec. J. C. de con. leg., i, tit. 3, s. 10; J. Voet. in Dig. l. xxii, tit. 2;) and, perhaps, of an army *in transitu* through a friendly state, (Wheaton's El., p. 140,) and of a foreign ship of war in the ports of the nation, (The Exchange, vii Cranch, p. 136.)

It follows by necessary consequence, save in the excepted cases enumerated, that a marriage, celebrated in any given place, must be celebrated according to the law of the place, and by a person whom those laws designate, unless the person by whom, or the premises in which, it is celebrated, possess the privileges of exterritoriality. (23) Therefore it may be, according to the opinion of Lord Stowell, that the presence of a foreign sovereign sojourning in a friendly country, or that of his minister plenipotentiary, or the act of a clergyman in the chapel or hotel of such sovereign or his ambassador, may give legality to marriage between subjects of his or members of his suite. (Ruding v. Smith, ii Haggard's C. R. 371; Prentiss v. Tudor, i Hagg. C. R. 136; i Burge on Col. & F. Laws, p. 168.)

But even such right of a foreign sovereign or his ambassador to celebrate a marriage, if it exist, applies only to his subjects, countrymen or suite. Such persons would be married according to the law of their domicil, or that of the sovereign or ambassador in whose service they are, on the assumption that, for all the purposes of legal right, their domicil goes with them, and that they are still at home, and in point of law are not in a foreign country where the marriage is in fact celebrated. A marriage, celebrated by such sovereign or his ambassador in a foreign country, between citizens of that country, or foreigners residing there or sojourning there, would derive no force from him: it would be null and void, unless legal according to the law of the place.

Consuls, it is still more evident, have no shadow of power to celebrate marriage between foreigners. Nor can they between their own countrymen, unless expressly authorized by the law of their own country; because, according to the law of nations, they have not the privileges of exterritoriality, like an ambassador.

That American consuls have no such power is clear, because it is not given to them by any act of congress, nor by the common law

of marriage as understood in the several states. (See Kent v. Burgess, xi Simons, 361.) And marriage, in the United States, is not a federal question, but one of the resort of the individual states. (Bishop on marriage, *passim*.) Hence, it is impossible for me to doubt:

First, that marriages celebrated by a consul of the United States in any foreign country of Chritendom, between citizens of the United States, would have no legal effect here, save in one (24) of the exceptional cases above stated of its being impossible for the parties to marry by the *lex loci*.

And, secondly, that marriages celebrated by a consul of the United States, in a foreign country, between parties not citizens of the United States, would have no legal effect here, unless in case the act be recognized expressly as valid by the law of the place of contract.

In countries where mere consent of the parties, followed by copula, constitutes marriage, as in Scotland, (McAdam v. Walker, i Dow's R. 148; Dalrymple v. Dalrymple, ii Hagg. C. R. 97,) and where the presence and testimony of any person whatever suffice to prove the consent, there a marriage contracted before a foreign consul might be valid, not because he is consul, but because the consent makes the marriage.

But, in most countries of Europe, specific forms of law are to be followed, without which there can be no valid marriage; and as it appears that the marriages, which the consuls of the United States have celebrated abroad, have in most cases been celebrated between persons collected at some seaport for the purpose of emigration, and who are not only foreigners as regards the United States, but foreigners also as regards the place in which the marriage is celebrated, it becomes material to consider the question, in the sense of this impediment of double alienage, in its relation to the law matrimonial of the United States.

The general rule of our law is to ascribe validity to marriages when they are valid at the place of celebration.

If the parties to the marriage are at the time actually in their own proper domicil, as in the case of Spaniards domiciled in Barcelona, and married there, it is clear that the local jurisdiction is absolute and complete, and that a consul of the United States has no more right to celebrate a marriage between such parties there than he has to undertake the duties of captain general.

Suppose, however, that the parties are foreigners to the foreign place, and at the same time not citizens of the United States?

The other governments of Christendom, and especially those (25)

of Europe, are, it is notorious, much more exacting and punctilious than the United States in the application of their own laws of personal *status* to their own subjects when absent from their country.

We may not regard this here, but they do among themselves; and therefore it is important to look at the legal bearings of a marriage celebrated in one European country between the subjects of some other government of Europe.

The general rule there is, that the civil obligations of a person follow him into a foreign country, save that in some countries forms are prescribed, according to which a subject may relieve himself of his allegiance to his natural sovereign and the consequent civil obligations. It is believed that many of the persons, who emigrate from Europe to the United States, have not taken these preliminary steps; and therefore, until they shall have acquired a new domicil in the United States, and while they are sojourning in some other foreign country on their way for, and previous to, their embarcation, they must of necessity be still subject to the law of their domicil in so far as this law is respected by the country of their transit or of their temporary sojourn; and the question of the validity of their marriage there by a foreign consul must depend on this legal condition of the parties in the countries of Europe.

In order to appreciate the legal relations in Europe of a marriage between parties foreign to the place of marriage, we may take as a convenient example, the state of the law in France.

In France, of course, all Frenchmen must conform to the precise provisions of their own law; nay, as a general rule, if they marry abroad, still they must observe certain of the conditions of the Code Civil, in order to give effect to the marriage in France. (Code Civil, no. 170; Foelix, *ubi supra*, no. 88.)

In regard to such foreign marriages of Frenchmen, it has been adjudged by the courts of that country, that,—

1. Frenchmen long established in a foreign country, and who have reserved no habitation and have no domicil in France, are not held to the forms of public notice there required by the Code. (Dalloz, Dict. Jur., Mariage, no. 374.)

(26) 2. Generally, all acts appertaining to the civil condition of Frenchmen abroad may be proved by the modes of proof practiced in the foreign country; and, therefore, a marriage may be proved by witnesses, or by the certificate of a diocesan, when celebrated in a foreign country where no registers of civil condition exist conformable to the Code. (Dalloz, *ubi supra*, nos. 346, 356.)

3. There are no differences of opinion as to the point, that Frenchmen who marry abroad must conform to the provisions of

the Code as to capacity, age, consent, and other conditions of substance; but there are contradictory decisions and opinions as to the point, whether it be or not essential to the validity of such marriage that there should have been previous publication of bans in France; and whether, if this be a radical defect, it is curable or not, (Dalloz, *ubi supra,* nos. 357, 375;) because the article of the Code (no. 170,) which legalizes a marriage contracted between Frenchmen abroad according to the forms used in the foreign country, adds,—provided (*pourvu*) the marriage be preceded by the publication of bans, and do not contravene the other conditions of law, as prescribed by the 1st and 2d chapters of the 5th title of the Code. (See Toullier, Droit Civil, tom. i, nos. 576, 579.)

4. The Code (art. 47 and 48) provides that any civil act of Frenchmen abroad shall be valid if it be drawn up in pursuance of the forms of the place, according to the rule *locus regit actum;* or if it has been received conformably to the laws by the diplomatic agents or consuls of France. It has been doubted whether this applies to marriage; though the better opinion is that it does. (Dalloz, *ubi supra,* nos. 362, 363; Toullier, Droit Civil, tom. i, no. 360; Merlin, Répert., Mariage, p. 641.) It is said, however, that if one of the parties to a marriage by a French consul abroad is French and the other not, then the marriage is null, because the consul has no jurisdiction as to the party not French, and the marriage may be attacked by either party. (Dalloz, *ubi supra,* nos. 365, 366.) In one of the cases where this point was decided, the parties possessed an act of marriage, with twenty years, cohabitation, (27) and two children. (Proudhon, Tr. des Personnes, tom. i, note a.)

5. Finally, a marriage contracted in France by a foreigner according to the exterior forms prescribed by the law would be null, of intrinsic nullity, if the foreigner infringed any of the prohibitions of his statute personal; that is, of the personal law of his domicil. (Foelix, *ubi supra,* s. 88.)

These views might be extended in detail to other countries of Europe.

Thus, in the Dutch Netherlands, in addition to the conditions of competency and of publication of bans, there must be legal contract before the proper magistrate, without which the marriage is a nullity. (Van der Linden, by Henry, p. 83.) As to this, no exception is made in favor of any persons whatever, being foreigners, or *in itinere*, or otherwise. (See Ruding v. Smith, ii Hag. C. R. 371, note.)

So, in Spain, marriage must be solemnized by prescribed rule, that is, through the intervention of the parish priest, or other clergyman with license of his ordinary, according to the article of the

Council of Trent concerning the reformation of matrimony. (Tapia, Febrero Novis., lib. i, cap. 2; Sala, Derecho real de España, lib. i, tit. 4.)

It is unnecessary to extend these examples. Suffice it to say, that in some countries religious or ecclesiastical impediments exist; in others, where that is not the case, the legal conditions of capacity and requisite forms are very serious obstacles. A critical examination of the law of different countries of Europe would only serve to augument the weight of legal objections to the celebration of marriages by consuls of the United States.

It may be, that a marriage between foreigners celebrated by a consul of the United States abroad, though utterly null in the country where it is celebrated, might, if the parties emigrate to this country, acquire validity in some of the states of the Union, as a marriage proved by repute and by cohabitation following consent, according to the old rule of the common law. Even then, the certificate of the consul would not constitute the mar- (28) riage; it would serve at most only as proof of consent, to be connected with proof of cohabitation.

But the practice of celebrating such marriages would be objectionable even then, because it is in fraud of the local jurisdiction, and contrary to the dictates of international comity, if not to positive law.

In what precedes, the inquiry has been treated as relating entirely to marriages assumed to be legalized by consuls of the United States residing officially in any of the countries of Christendom.

For, in regard to states not Christian, although we make treaties with them as occasion may require, and assert in our intercourse with them all such provisions of the law of nations as are of a political nature,—yet we do not suffer, as to them, that full reciprocity of municipal obligations and rights which obtains among the nations of Christendom.

This point is determined very explicitly in our treaty with China, which, in the most unequivocal terms, places all the rights of Americans in China, whether as to the person or property, under the sole jurisdiction, civil and criminal, of the authorities of the United States, (see the treaty, viii Stat. at Large, p. 592;) and congress has made provision to meet the exigencies of the treaty in this respect. (Act of August 11, 1848, ix Stat. at Large, p. 276.)

Our treaty with Turkey is less explicit on this point; but it expressly ascribes to citizens of the United States exterritoriality in criminal matters, (see the treaty, viii Stat. at Large, p. 408,) provision as to which is made by the above-cited act of congress; and as

the treaty stipulates how controversies in Turkey, between citizens of the United States and subjects of the Porte, shall be adjudicated, that is, by the local authorities in presence of a representative of the United States; and as it stipulates that only a certain class of litigation shall be submitted to the Porte; and as it gives to Americans in Turkey all the rights of the most favored nation, with express reference to "the usages observed towards other Franks,"—it might be assumed that the doctrine of exterritoriality applies to Americans in Turkey, as it certainly does to subjects there of all the (29) Christian states of Europe. (Moreuil, Guide des Agents Consulaires, tit. 2.)

Our treaties with the minor Mahammedan governments of Tripoli, Morocco, Muscat, and Bruni, are even less explicit than that with Turkey. Still, it may be assumed in regard to them, as a principle of the international law of the world, so far as there is any, that unless there be express agreement to the contrary, no Christian nation admits a full reciprocity of municipal rights as between itself and any state not Christian; and therefore, that, in the Mohammedan governments above enumerated, Americans possess the rights of exterritoriality which belong to all other "Franks," that is, the races of independent Christian Europe and America. (See Ward's Law of Nations, vol. ii, *passim;* Kluber, Droit des Gens, s. id.; Wildman's Institutes, vol. i, p. 130.)

In our treaty with Siam, we have inconsiderately engaged that our citizens being there "shall respect and *follow* the laws and customs of the country *in all points.*" (See the treaty, viii Stat. at Large, p. 455.) I do not know how they are to do this, unless they become Pagans "in all points." That provision of the treaty is, in the international relations of the United States, the solitary exception, it is believed, to the rule that the municipal rights of citizens of the United States are not subject to the local law of any state not Christian.

True, we deal with such states as *governments,* and apply to them, so far as we can, the doctrines of our international law. (The Helena, iv Robins. Adm. R. 5.) But, when we speak of the law of nations, we mean the international law of the nations of Christian Europe and America. Our treaties with nations other than these bring them practically within the pale of our public law, but it is only as to *political* rights: municipal rights remain as they were. (Wheaton's Elements, p. 44; Polson's Law of Nations, p. 17; Phillimore's International Law, p. 86.)

On this point, as on all others in the course of the present opinion, English and American authorities are cited indiscriminately, because the law of both countries maintains the same doctrine in the premises;

and Great Britain is in advance of, (30) rather than behind, the other nations of Christendom, in repelling the municipal jurisdiction of communities not Christian.

The doctrine above enunciated applies to Japan; to the minor independent states of Asia and its islands, whether Mohammedan, Indo-Chinese, Malay, or what others; to the barbaric political communities of Africa; and still more to the petty insular tribes of Oceanica.

Our treaty with the Hawaiian Islands places them on the footing of a Christian state, with the municipal rights belonging to the international law of Christendom. (ix Stat. at Large, p. 977.)

Now, in regard to the states not Christian, not only the Mohammedan states, but all the rest, it seems to me that the true rule is, that contracts of citizens of the United States in general, and especially the contract of marriage, are not subject to the *lex loci,* but to be governed by the law of the domicil; and that, therefore, in such countries, a valid contract of marriage may be solemnized, and the contract authenticated, not only by an ambassador, but by a consul of the United States.

The English authorities come to substantially the same conclusion, for similar reasons. "Nobody can suppose," says Lord Stowell, "that whilst the Mogul Empire existed, an Englishman (in Hindostan) was bound to consult the Koran for the celebration of his marriage." In most of the Asiatic and African countries, indeed, law is personal, not local, as it was in many parts of Modern Europe in the formative period of its present organization. Hence, in British India, Hindus, Parsis, Jews, Mohammedans, Christians, all marry according to the law of their religion. Nay, the ecclesiastical law of England goes further than this, for it recognizes the marriage of Englishmen, celebrated according to the English law, that is, by a clergyman, in British factories abroad, though situated in Christian countries, but countries of the Roman Catholic or Greek religion. (Ruding v. Smith, ii Hagg. C. R., p. 371; Kent v. Burgess, xi Simons, 361.) Indeed, in the preceding cases, as in others, the English authorities, as we have already seen, lay down the broad rule that where, owing to religious or legal difficulties, the marriage is impossible by the *lex loci* still (31) a lawful marriage may be contracted, and of course authenticated, by the best means of which the circumstances admit, as in many cases of marriage contracted in the East Indies and in other foreign possessions of Great Britain. (See Catterall v. Catterall, i Roberts, 580.)

This doctrine is conformable to the canon law, which gives effect to what are called *matrimonia clandestina,* that is, marriages celebrated without observance of the religious and other formalities de-

creed by the Council of Trent, (Cavalario, Derecho Canonico, tom. ii, p. 172; Escriche, s. v. Matr.,) when contracted in countries where, if those decrees were enforced, there could be no marriage, (Walter, Derecho, Ecclesiastico, s. 292, 294.) Nay, in such countries, in the absence of a priest, there may be valid marriages by consent alone, conformably to the canon law as it stood before the Council of Trent, either by *verba de praesenti* or by *verba de futuro cum copula*, as happened *ex necessitate rei*, under the Spanish law, in remote parts of America. Of course, in circumstances like this, a marriage might be legalized by a mere military commandant. (Patton v. Phil. & New Orleans, i La. An. R., p. 98; see also Hallett v. Collins, x How. p. 174.)

Surely this doctrine applies to the present question; for, seeing that, by the common law of marriage, as now received in all, or nearly all, the states of the Union, marriage is a civil contract, to the validity of which clerical intervention is unnecessary, (Bishop on Marriage, s. 163,) it would seem to follow, at least as to all those countries, barbaric or other, in which there is in fact no *lex loci*, or those Mohammedan or Pagan countries, in which, though a local law exist, yet Americans are not subject to it, that there the personal statute accompanies them, and the contract of marriage, like any other contract, may be certified and authenticated by a consul of the United States.

But this doctrine does not apply to the countries of Europe, or their colonies in America or other parts of the world: in all which there is a recognized law of the place, and the rule of *locus regit actum* is in full force. There, in my opinion, a con- (32) sul of the United States has no power to celebrate marriage between either foreigners or Americans.

It appears by the correspondence accompanying your communication that, in some parts of Europe,in consequent of poverty or other impediments thrown in the way of marriage, there is great prevalence of concubinage; that the desire of lawful cohabitation enters into the inducements of emigration; and that it becomes an object, especially with emigrant females, to obtain, before leaving their country, if not a marriage, yet an assured matrimonial engagement; and that such parties are in the practice of entering into mutual promises of marriage, and procuring the contract to be certified by the consul of the United States. Such a contract would probably give rights of action to the parties in this country; it must have a tendency to promote the good morals, and be particularly advantageous to the party most needing protection, that is, the female emigrant; and nothing in our own laws, or in our public policy, occurs to me as for-

bidding it, unless it be contrary to the law of the land in which the contract is made.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII, p. 186 (Cushing)

AMBASSADORS AND OTHER PUBLIC MINISTERS OF THE UNITED STATES

(Syllabus) The expression "ambassadors and other public ministers," which occurs three times in the constitution, must be understood as comprehending all officers having diplomatic functions, whatever their title or designation.

Hence, the president has power by the constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the senate.

The power to make such appointments is not derived from, and cannot be limited by, any act of congress, except in so far as appropriations of money are necessary to provide means for defraying the expense of this as of any other business of the government.

During the entire administrations of Washington, John Adams, Jefferson, and the first term of that of Madison, no mention occurs in any appropriation act, of ministers of a specified rank at this or that place; but, sometimes by special act, and sometimes in the general appropriation acts, the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended in the discretion of the president; and although, since that time, the practice has been to provide for certain ministers at certain places, yet that mode of legislation does not in terms, and could not in law, either extend or restrict the constitutional authority of the president, (187) by and with the advice and consent of the senate, to negotiate treaties and make diplomatic appointments, according to his and their judgment of the public interests of the Union.

Commencing with the administration of our foreign affairs by Mr. Jefferson under President Washington, and so continuing under every successive president down to the present time, it has been the uniform practice of the government to regard the titular designations and the appointments of all diplomatic ministers as the exclusive and proper constitutional function of the conjoint executive department, that is, the president and the senate.

"Ambassadors," by the public law of Europe, enjoy the highest privileges, because of the pretended or putative direct relation of the ministers of this name to their sovereign; but the imperial or regal sovereignty of a European monarchy neither has nor can have any public right in this respect, which does not equally belong to the popular sovereignty of a republic like the United States.

The president has constitutional power to appoint, by temporary commission, a diplomatic officer to meet any public exigency arising in the recess of the senate.

The president has constitutional power, in the recess of the senate, to change the designation of any mission, either by substituting a higher for a lower rank, or a lower for a higher, independently of any authorising act of congress.

Congress cannot by law require that the president shall make removals or reappointments or new appointments of public ministers on a given day; not that he shall at all times appoint and maintain a minister of a prescribed rank at a particular court; because, while the House of Representatives has control of the tax power and of appropriations, yet the constitution has intrusted the whole negotiating power to the president in behalf of the aggregate Union, and to the senate composed of the legislative and executive ministers of the separate sovereignty and rights of each of the states of the Union.

When the act of the last congress to remodel the diplomatic system of the United States, declares that from and after the end of the present fiscal year the president *shall* appoint envoys extraordinaries, with secretaries of legation, at every place except one in Europe, Asia, or America where the United States now have any diplomatic agent, whether envoy, minister resident, chargé d'Affaires, or commissioner, and proceeds to define the salaries of such envoys and secretaries,—it could not constitutionally mean, and therefore is not to be construed as meaning, to *require* the president to make any such appointments, but only to determine what shall be the salaries of such officers, in case they have been, or shall be, lawfully appointed at any time by the president.

The phrase "from and after" a certain day, employed in the act, does not determine what its legal effect shall be, but only the time, when that legal effect, whatever it is, shall commence.

The auxiliary verb "shall" in the act, wherever it occurs in reference to appointments, is only a word of time as to incidents, and never of command as to the main fact.

(188) The act has no general phrase of repeal, and no effect of repeal by implication, and repeals nothing except such specific things as it repeals in express terms.

The president may, notwithstanding this act, continue to appoint or to retain public ministers of the rank of commissioner, minister resident, or chargé d'affaires, in his discretion, with concurrence of the senate.

The existing laws, which prescribe a rate of salary for ministers resident and chargé d'affaires, are not affected by this act, and still continue in full force.

Envoys extraordinary and secretaries of legaton in office will, on the day fixed, be entitled to the benefits, and subject to the deductions, of the new provisions of this act regarding compensation, including salary whether increased or not, and prohibition of outfit or infit, without reappointment by the president.

The president may appoint envoys at the places where the present minister is a minister resident, and in that case the new envoy will be entitled to the salary prescribed by the act.

The president may leave unchanged all the ministers resident; in which case they will each be entitled severally to the salary prescribed by the pre-existing acts of congress.

The president may or not, in his discretion, appoint secretaries of legation at the places mentioned in the act.

If the legal effect of the act could be considered as the prospective creation of new offices, to begin to exist at a future day certain, then the president might appoint on that day as for a vacancy then existing in the recess of the senate; but as the office of public minister is in fact a constitutional, not a statute one, he might appoint without the act, and in virtue of the constitution.

The phrase in the act,—"shall, by and with the advice and consent of the senate, appoint," cannot take away any constitutional power of the president to

appoint in the recess of the senate, and has no effect save to negative the idea of its being intended to create any such "inferior officers," the appointment of which may be vested by congress in the president alone or in the heads of departments.

The whole effect of the act, as to appointments, is, by the provision for new salaries on a given day, to invite the president to make new appointments on that day if he see fit; but whether he shall make them or not is a question of his mere executive discretion under the constitution.

The question of executive discretion in the case, being wholly independent of this act, is the permanent one, of wise and lawful discretion having its measure in the exigencies of the public service and the letter and spirit of the constitution.

The president may lawfully appoint new envoys and secretaries at all the places mentioned in the act; the act affords the pecuniary means of doing this; the president may well and should do this, in any particular case, where the public service seems to him to require it; but for him to change the *personnel* or raise the rank of the entire diplomatic service of the United States in the recess of the senate, and without the concurrence of that co-ordinate authority, would not be a just exercise of the presidential discre-(189)tion, whether in its relation to the ministers themselves, to the public service, or to the spirit of the constitution.

The salary prescribed by existing law for all the present ministers resident, except one, is $4,500; for that one, the minister to the Ottoman Porte, it is $6,000; which latter sum is the general statute compensation of ministers resident in all cases save where the lower salary is expressly prescribed by particular act of congress.

Although the appropriation act of the last session of congress, in appropriating for the diplomatic service of the next fiscal year, provides in terms for envoys extraordinary only, still that appropriation is, by collation with express provision of previous laws, subject to draft for the compensation of diplomatic officers of whatever rank lawfully in office by appointment of the president.

The commissioner of the United States in China, while he is a diplomatic officer by the law of nations, is also a judicial officer by treaty and by statute.

The provision of the new act, which contemplates the appointment only of an envoy extraordinary to China, is imperfect; for, although the first minister of the United States, in China, held those two distinct commissions, yet a repetition of that fact at this moment would not be compatible with the diplomatic relations at present existing between the United States and China.

* * * * * * *

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII, p. 242 (Cushing)

APPOINTMENT OF CONSULS

It belongs exclusively to the president of the United States, by and with the advice and consent of the senate, to appoint consular officers to such places as he and they deem to be meet.

Consuls are officers created by the constitution and the laws of nations, not by acts of congress.

Congress may by law vest the appointment of inferior consular officers in the president alone or in the secretary of state.

When the act of the last congress, remodelling the consular system, says that from and after the 30th of June next the president *shall* appoint consuls to certain places, it means that he *may* appoint them, if he see fit, with such reference to the advice and consent of the senate as the constitution prescribes.

The act does not require him to appoint new consuls, or to reappoint the present incumbents, at the places mentioned, nor to remove consuls now existing at places not named in the act, nor to omit to appoint new ones at other places not named in it.

The rates and mode of compensation, by the act, take effect in regard to all consuls at the places named, and lawfully in office at the day fixed, whensoever they have been or shall be appointed.

All of the provisions of the act regarding the duties of consular officers take effect on the 1st of July.

Nothing in the act forbids the continued appointment of vice-consuls or consular agents, with approval of the secretary of state.

The several consuls for whom the act provides annual salaries, must collect and pay over all fees for consular service to the government.

The penalty of removal from office, which the act affixes to the nonperformance of some duties by consuls, is inoperative, because removal from office cannot be enacted as a statute penalty, it being a matter for the constitutional discretion of the president.

Consuls not duly accounting for fees collected for consular service are subject to indictment for the statute crime of embezzlement, in the terms of the act of 1846, which regulates the collection, safe-keeping, and disbursement of public moneys.

Consuls, commercial agents, vice-consuls, and consular agents, for whom salaries are not provided by the act, are entitled to continue to receive fees for consular service.

The act does not repeal any fees except those which it expressly mentions, and leaves all others as they now stand by act of congress or regulations of department.

The provisions of the act against the appointment of any citizen of the United States, not actually residing therein or aboard in the public service at the time, is directory only, not mandatory on the president.

In taking charge of the estates of citizens of the United States dying abroad, the power of consuls is limited to collecting the assets abroad, discharging (243) them of local liabilities, reducing them to money, and transmitting to the treasury, subject to the orders, both before and afterwards, of the lawful executor or administrator.

The rule for the distribution of the personal effects of any deceased citizen of the United States, either at home or abroad, is the law of the particular state of his domicile, and cannot be changed by the act of congress.

Consuls-general are the proper persons to hold consular posts in the capitals of the great transmarine dependencies of European powers, and to constitute the medium of communication with the local governor or captain general, and are appointable at the discretion of the president with consent of the senate.

Attorney General's Office,
June 2, 1855.

Sir: I proceed now to complete my reply to your communication of the 17th ultimo, by disposing of so much of the same, and of the written memoranda and verbal suggestions accompanying it, as relates to the consular provisions of the act of the last congress, entitled "An act to remodel the diplomatic and consular systems of the United States."

The act provides, in its fourth section, as follows:

"Sec. 4. And be it further enacted, That from and after the thirtieth day of June next the President of the United States shall, by and with the advice and consent of the senate, appoint consuls for the United States, to reside at the following places, who shall receive during their continuance in office an annual compensation for their services not exceeding the amount specified herein for each, and who shall not be permitted to transact, under the penalty of being recalled and fined in a sum not less than two thousand dollars, business either in their own name or through the agency of others."

The section then goes on to enumerate sundry places, in various parts of the world, with salaries annexed to each, thus,—"London, seven thousand five hundred dollars."

The act provides, in its fifth section, as follows:

"Sec. 5. And be it further enacted, That from and after the thirtieth day of June next the President of the United States shall, by and with the advice and consent of the Senate, appoint consuls and commercial agents for the United States, to reside at the following places, who shall receive, during their continu- (244) ance in office, an annual compensation for their services not exceeding the amount specified herein for each, and who shall be at liberty to transact business." And the section then goes on to enumerate sundry places, each with salary annexed, some of them thus,—"Southampton, one thousand dollars;" and others thus,—"Curaçao, five hundred dollars, (commercial agent.)"

The 6th and 7th sections declare that no consul or commercial agent, who shall, after the thirtieth day of June next, be appointed to any of the places *herein named,* shall be entitled to compensation until he shall have reached his post and entered upon his official duties; and that the compensation of every consul or commercial agent, so appointed to any of the places herein named, shall cease on the day that his successor shall enter upon the duties of his office.

The 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, and 23d sections provide various regulations concerning

"consuls and commercial agents;" the 9th also, and that alone, mentioning "vice-consuls" and "consular agents."

The 12th section provides as follows:

"Sec. 12. And be it further enacted, That it shall be the duty of consuls and commercial agents to charge the following fees for performing the services specified, for which, under the penalty of being removed from office, they shall account to the government at the expiration of every three months, and hold the proceeds subject to its drafts:

"For receiving and delivering ships' papers, half cent on every ton, registered measurement, of the vessel for which the service is performed.

"For every seaman who may be discharged or shipped at the consulate or commercial agency, or in the port in which they are located, one dollar; which shall be paid by the master of the vessel.

"For every other certificate, except passports,—the signing and verification of which shall be free—two dollars."

The 28th section declares that the President of the United States is "authorized to bestow the title of consul general" **(245)** upon any consul in Asia or Africa, "when, in his opinion, such title will promote the public interest."

The 26th section repeals all acts or parts of acts authorizing the payment to consuls of "salaries for clerk-hire and office-rent."

The 27th section provides as follows:

"Sec. 27. And be it further enacted, The provisions of this act to take effect from and after the thirtieth of June next, any law or laws of the United States to the contrary notwithstanding."

Upon the construction of this act, the first question is: Does it supersede the consuls who may be in office when it goes into effect?

My judgment on this point is governed by the considerations stated at length in my letter of the 25th ultimo regarding the public ministers of the United States, which considerations apply in principle to the subject of consuls, and compel me to think that the words of enactment,—the president *shall* from and after such a day appoint,—signify only, *may* appoint,—or rather, that such and such compensation shall be allowed, after such day, to such officers of the denomination and at the places specified, who shall from and after that day be lawfully in office under the constitution or acts of congress. Of course, the act does not operate, either *proprio vigore,* or by compulsion of the president's will, so as to *supersede* any consul. I refer to that communication for a full statement of the considerations of constitutional right, or

legislative and administrative action, and of statutory construction, which bring me to this conclusion.

It occurs to me, however, that one of those arguments may have additional force of impression, in being presented from another point of view.

The appropriation act provides that the increased salaries, which the new act allows from and after a certain day, may be paid to such existing envoys extraordinary as may not be reappointed. This clause of the appropriation act does not repeal anything; it only assumes that a certain thing may lawfully happen, and then declares what is to be intended as the mean- (246) ing of the general act as applicable to that thing in case it shall thus happen. That supposed lawful thing is, the abstention of the president from reappointing certain envoys extraordinary. Now, this abstention could not be lawful if the language of the act, in regard to the appointment of envoys from and after a prescribed day, implied an obligation imperative on the conscience of the president. But the clause of the appropriation act admits the legality of the supposed abstention: of course the provision of the new law in relation to the appointment of envoys, from and after a certain day, though absolute in terms, is not to be construed as imperative, and was not so intended by congress, either in the sense of inclusion of appointment or of exclusion, or as regards either time or nominal designation.

Now, the same precise words, and in the same collocation, are employed in regard to consuls and commercial agents, as well as envoys and secretaries of legation; and, according to the settled rules of statutory construction, what they mean in one of the cases they mean in all. But we have ascertained that the words are not imperative in their relation to envoys. Of course they are not imperative in their relation to consuls and commercial agents, either in the sense of inclusion of appointment or of exclusion, or as regards either time or nominal designation.

Neither the present nor any other law of the United States professes to define the difference of meaning between the terms consul, vice-consul, commercial agent, and consular agent. Some writers on public law employ the term "consular agent" as the generic designation of the class of consular officers, just as "diplomatic agent" is often used in a similar generic sense to denote all diplomatic officers, the ambassadors and public ministers of the constitution. But the term "consular agent" certainly has a much narrower acceptation in the usage of this government. The language of the constitution, as well when it refers to the appointments of our own "consuls," as when it gives to the courts of the United States jurisdiction over

foreign "consuls," must be regarded as making this latter term the true nominal designation of the class in our law.

(247) In the early usage of the government, we had only consuls and vice-consuls, both appointed by nomination to the senate; but the present act, in the section where it speaks of "vice-consuls" and "consular agents," seems to regard them as the subordinates of consuls, and not requiring nomination to the senate; and this view of their relation is in accordance with existing usages. (Moreuil, Agents Consulaires, p. 65.)

The act assumes another description of consular functionary, that of "commercial agent," as requiring to be commissioned by nomination to the senate, and therefore having the same relation to the laws of the United States as "consul;" and, in assigning "commercial agents" to the colonial ports of the Netherlands, it recognizes the existing usage, of applying this designation to consular officers appointed to countries where no formal recognition of them by *exequatur* can be demanded or obtained by the government.

Inspection of the language of public treaties will aid us to understand the mutual relation of the several grades of "consuls."

Our first consular convention with France stipulates that either government may appoint consuls and vice-consuls, who may establish "agents" in the different ports or places of their departments, such agents to hold by "commission from one of the said consuls." (viii Stat. at Large, p. 108.)

Our previous treaty of commerce with France provides that each government may have, in the ports of the other, "consuls, vice-consuls, agents, and commissaries." (viii Stat. at Large, p. 28.)

The same phrase occurs in our first treaty of amity and commerce with Sweden. (viii Stat. at Large, p. 74.)

In a subsequent treaty with the same power, (viii Stat. at Large, p. 236,) the phrase employed is consuls, vice-consuls, and commercial agents, (agents de commerce.) It also speaks of "consuls and their deputies," (suppléans.)

In a treaty with Russia, consuls, vice-consuls, commercial agents, (agents commerciaux), and commissaries, are classed together as consular officers. (viii Stat. at Large, p. 448.)

But the late consular convention with France is the most (248) explicit of all on this point. It makes provision for consuls general, consuls, vice-consuls, and consular agents; the vice-consuls and consular agents to be appointed by the consuls general and consuls, and approved by their government. (Session Acts 1853-4, Treaties, p. 117.) It also provides for "élèves consuls."

This convention is framed with reference to the laws of France,

by which vice-consuls and consular agents are the "delegates" of the consuls, (Ordon. 26 Octobre, 1833, De Clercq, Formulaire, p. 509,) and which establish the office of élève consul, (Ordon. 20 Août, 1833, ibid., p. 467.)

We may conveniently regard the word of the constitution, "consuls," as the generic designation of a class of public officers existing by public law, and recognized by numerous treaties, who are appointed by their government to reside in foreign countries, and especially in seaports, and other convenient points, to discharge administrative, and sometimes judicial, functions in regard to their fellow-citizens, merchants, mariners, travellers, and others, who dwell or happen to be in such places; to aid, by the authentication of documents abroad, in the collection of the public revenue; and, generally, to perform such other duties as may be assigned to them by the laws and orders of their government.

Congress cannot, by legislative act, appoint or remove consuls any more than ministers; but it may increase at will the descriptions of consular officers; it may enlarge or diminish their functions; it may regulate their compensation; it may distinguish between some officers appointable with advice of the senate, and others appointable by the president alone, or by a head of department.

Accordingly, by successive acts of congress, namely: the act of April 14th, 1792, (i Stat. at Large, p. 254;) July 6, 1797, (i Stat. at Large, p. 533;) March 2, 1799, (i Stat. at Large, p. 690;) February 20, 1803, (ii Stat. at Large, p. 203;) March 3, 1813, (ii Stat. at Large, p. 810;) April 20, 1818, (iii Stat. at Large, p. 437;) March 1, 1823, (iii Stat. at Large, p. 737;) March 3, 1836, (iv Stat. at Large, p. 773;) July 20, 1840, (v Stat. at Large, p. 394;) March 3, 1843, (v Stat. at Large, p. (249) 750;) August 11, 1844, (ix Stat. at Large, p. 276;) July 29, 1850, (ix Stat. at Large, p. 442;) and by various other incidental provisions of law, duties are imposed, and rights conferred on this class of public officers, under the different statute names of consuls general, consuls, vice-consuls, commercial agents, vice commercial agents, and consular agents.

But all these acts do by no means exhaust the subject. On the contrary, the important act of 1792 contains a declaratory provision, which is to be understood as implied in all other acts of congress, as follows:

"The specification of certain powers and duties herein to be exercised or performed by the consuls and vice-consuls (or other consular officers) of the United States, shall not be construed to the exclusion of others resulting from the nature of their appointments, or any treaty or convention under which they may act." (Sec. 9.)

So that, outside of acts of congress, the functions of consuls are indicated, and their duties and rights defined, first, by many general treaties, conventions, and consular conventions, entered into between the United States and other sovereign powers.

Then, like other executive officers of the United States, consuls are subject to regulations issued by the proper head of department. (See Henshaw's Manual, p. 122; Gratiot v. United States, iv Howard's R., p. 80; United States v. McDaniel, vii Peters, p. 1; Aldridge v. Williams, iii Howard, p. 9.)

In addition to which, they possess, by the law of nations, many functions, rights, and privileges, other than such as are defined by convention, by legislative act, or by regulation.

But their appointment remains unchangeably one of the organic powers of the executive, derived from the constitution, not from any act of congress.

In illustration of which is the fact, that, in the course of the first three years of the administration of President Washington, and prior to the enactment of the first act of congress on the subject, consuls were duly appointed and commissioned, mostly during the sitting of the senate, but some in its recess, for the ports or islands of Canton, Madiera, Liverpool, Dublin, Bordeaux, Nantes, Rouen, Hispaniola, Martinique, Bilbao, London, (250) Surinam, Santa Cruz, Lisbon, Morocco, Copenhagen, Bristol; and vice-consuls for Cowes, Marseilles, Hamburg, Havre-de-Grace, Fayal.

It is impossible for me to doubt, therefore, that the only effect of the new act in this relation is to say, that as to such consuls or commercial agents as shall, on the day prescribed, be lawfully in office at the respective places mentioned, the rate of compensation per annum thereafter shall be such as the act allows. The president may appoint new consuls at any of the places mentioned on that or any other date, if he sees fit, because this the constitution empowers him to do; but this act neither empowers nor requires him to do it: all which in this relation it enacts is rate of compensation for "consuls" and " commercial agents" at certain places, whenever the same shall be, or may have been, appointed; that compensation to take effect on the day defined by the act.

Further to show that this act cannot be reasonably construed as intending to require the president to do what the constitution, on considerations of public policy, has intrusted to the sole discretion of the executive, may be mentioned the clause of the act which says, that the president shall appoint a "consul" at Port-au-Prince. This, if done, would have the effect, according to international usage, of placing the Haytien empire in diplomatic relation with the United

States. It is not presumed that such was the purpose of the lawmakers; yet such is the necessary effect of the law, if the words "shall appoint" are mandatory in operation. If they are mandatory in any case, they are in all: if not mandatory in one case, they are so in none.

Another illustration, which this act itself affords, of the necessity of leaving the power of determining when and at what places to appoint officers of this class, and of what rank to appoint them, where the constitution placed it—in the hands of the executive—is the provision for establishing "commercial agents" in five of the colonies of the Netherlands. This provision has apparent reference to the fact, which once existed, namely, the refusal of the Netherlands to receive consuls in their colonies. But this fact no longer exists; for the (251) convention of January 22, 1855, between the United States and the Netherlands, and the ratifications of which have been exchanged, stipulates for the admission of consuls general, consuls, and vice-consuls, in all the open ports of the transmarine possessions of the Netherlands.

Before passing from this part of the act, it may be well to observe that the phrase in the 4th section, which forbids certain consuls "to transact * * business either in their own name or through the agency of others," cannot be taken literally; for if so, the consul could not have any private interests, or even a household, all which involve the transaction of business. These words must be construed in reference to the mischief, which the history of the acts show they were intended to remedy, namely, "trading as a merchant," which, undoubtedly, the provision prohibits. In the 6th section the same phrase of undue generality is found, but there it is employed in the sense of permission, and therefore does not need to be carefully scrutinized.

In forbidding consuls "to transact business," that is, "to trade as merchants," the 4th section further says, "under the penalty of being recalled and fined in a sum not less than two thousand dollars."

The phrase here used,—"under the penalty of being recalled," like that in the 12th section requiring the consul to collect and account for certain fees "under the penalty of being removed from office," is of dubious legality. I do not think dismissal from office can be enacted by statute as penalty. What court is to try and judge? Is the provision designed for the case of impeachment? It does not say this. Does the act mean to dictate to the president when to remove a public officer? That cannot be. The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the constitution.

Besides, it is neither convenient nor according to the analogies of our political system, to consider removal from office the infliction of a legal penalty. A penalty is the result of a legal process. Dismissal from office belongs to a different class of administrative or political considerations, resting in the mere executive discretion of the president.

(252) On the whole, this provision of the statute must be deemed inexecutable.

No provision is made as to the process by which this fine of two thousand dollars is to be recovered. In the case of another violation of duty, the 20th section indicates the remedy by indictment under the act of July 20th, 1840. *Possibly* the same remedy would apply here, as the act referred to makes consuls and commercial agents indictable "for all malversation and corrupt conduct in office." (v Stat. at Large, p. 397.) I should be more confident on this point, but for the fact of the present act singling out the misdemeanor of the 20th section is indictable under the act of July 20, 1840, and thus raising negative inference as to the applicability of the penal process of that law to the other new definitions of misconduct in office. Possibly the present fine, if not recoverable by indictment, might be reached by an action of debt in the name of the United States.

The foregoing observations afford a reply to several of the points of inquiry verbally indicated by you, and also to three others of the questions of the written memorandum of the 17th ultimo, namely:

Can consuls not newly appointed or reappointed at the places named in the act, receive the salaries therein affixed to said places respectively?

Can the president appoint or retain consuls at places where there are now consuls, but with no provision in the act for consuls at such places?

Can the president, by and with the advice of the senate, appoint consuls at places where there are now no consuls, and with no provision in the act for consuls at such places?

To each of these questions, my reply is in the affirmative. The act has operation, in respect of salary, as to consuls at the places named, without their being reappointed; such as have been lawfully appointed continue in office until their present commissions are withdrawn; and the president can, with concurrence of the senate, appoint consuls at any place whatever, whether they be mentioned in the act or not.

The appropriation act of the last session of congress contains (253) an item of two hundred and seventy-one thousand seven hundred and fifty dollars "for the consuls of the United States." All

the observations concerning the similar appropriation for envoys, in the same act, apply to this appropriation for consuls.

The next question is,—Can vice-consuls and consular agents be appointed after this act goes into operation?

Undoubtedly. The act provides for consuls or commercial agents at certain places; but does not contain any phrase, which, either expressly or impliedly, forbids the appointment of consuls or commercial agents at other places, or the appointment of vice-consuls or consular agents. If it did, the prohibition would be without efficacy. Instead of even professing to do this, although the act provides places and salaries for consuls and commercial agents only, yet, in the 9th section, it expressly recognizes, by name, and regulates, in some respects, vice-consuls and consular agents. While so mentioning and regulating them, it leaves untouched the law, whatever it is, by which their existence and their functions are determined.

Next comes the question,—What is the operation of this act in respect to fees, so far as regards the consuls and commercial agents to whom the act gives salary?

In order to answer this question satisfactorily, it becomes necessary to analyze the various pertinent provisions of the act.

In the first place, it does not contain any general clause of repeal. At its close, instead of the usual phrase,—"All acts or parts of acts inconsistent herewith are hereby repealed,"—it says,—"The provisions of this act to take effect," on a certain day, "any law or laws of the United States to the contrary notwithstanding." Of course, the section leaves the question, of what the act repeals, to depend on other parts of it, and its general tenor.

In the second place, the act in its general tenor is *affirmative;* and the established rule of law in this respect is, that "an affirmative statute does not repeal a precedent affirmative statute; and if the substance be such that both may stand together, they shall have a concurrent efficacy." (Dwarris on Sta- (254) tutes, p. 474.) Of course, on the point whether any provision of this act repeals by implication of identity of subject matter any provision of previous acts, it will be necessary to consider whether the two provisions compared are incapable of concurrent efficacy.

If the act professed to revise the question of consular regulation as a whole, then it might by implication repeal former acts. (Bartlett v. King, xii Mass. R. p. 548; Commonwealth v. Cooley, x Pick. R. p. 40.) But this it does not undertake to do. And law does not favor repeal by implication. (Snell v. Bridgewater Manufacturing Company, xxiv Pick. p. 296.) Hence, a later statute on a given subject, not repealing an earlier one in terms, is not to be

taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embaces the whole subject-matter. (Goddard v. Barton, xx Pick. p. 410.)

In the third place, the act refers to, and amends expressly, or adopts for new purposes, parts of previous acts in several instances; as the acts of February 28, 1803, and of July 20, 1840, in the 19th section, and that of April 14, 1792, in the 21st. Of course it does not in other respects repeal those acts.

Finally, it contains provisions expressly repealing particular things assumed to be allowable by previous acts: as allowances of "clerk hire and office rent," in the 26th section; "fees for the signing and verification of passports," in the 13th; and "commissions for receiving or disbursing wages or extra wages of discharged seamen," in the 14th. Such cases of express repeal in a statute, especially of certain individual things of a class, are the ordinary implication that all other things of the same class remain unrepealed.

Bearing in mind these premises, let us now see what the 12th section of the act says on the subject of fees of consuls and commercial agents.

Its language, we have seen, is very peculiar, as follows:

"Sec. 12. And be it further enacted, "That it shall be the duty of consuls and commercial agents to charge the following fees for performing the services specified, for which, under the penalty of being removed from office, they shall account to the (255) government at the expiration of every three months, and hold the proceeds subject to its drafts:

"For receiving and delivering ships' papers, half cent on every ton, registered measurement, of the vessel for which the service is performed.

"For every seaman who may be discharged or shipped at the consulate or commercial agency, or in the port in which they are located, one dollar; which shall be paid by the master of the vessel.

"For every other certificate, except passports,—the signing and verification of which shall be free,—two dollars."

This provision imposes, in terms, a special *duty* on "consuls and commercial agents," which is, to collect certain fees for the benefit of the government.

Does this provision, in terms, forbid the receipt of any other fees? Undoubtedly not.

Let us assume the case of some other fee, which "consuls and commercial agents" are now permitted by statute to demand, and reason upon it: for instance, the fees for taking charge of, and pay-

ing, or delivering over, the effects of decedents, citizens of the United States, within their jurisdiction.

The act of April 14, 1792, entitled "An act concerning consuls and vice-consuls," contains the following provisions:

"For the taking into possession, inventorying, selling, and finally settling, and paying, or transmitting as aforesaid, the balance due on the personal estate left by any citizen of the United States, who shall die within the limits of his consulate, five per centum on the gross amount of such estate.

"For taking into possession, and otherwise proceeding on any such estate, which shall be delivered over to the legal representative before a final settlement of the same, as is hereinbefore directed, two and a half per centum on such part delivered over as shall not be in money, and five per centum on the gross amount of the residue."

Is this fee withdrawn by the 12th section of the present act? I think not. There is no phrase in it which hints at such repeal. Was it the design of the section to require the collection of certain fees, and those only? If so, the section does not say (256) this: it contains not a single word of general exclusion or prohibition.

Nor can it by any established rule of construction be held to imply this; for the enactment that it shall be the duty of "consuls and commercial agents" to collect and pay over to the government certain particular fees, is perfectly compatible with their lawfully demanding and receiving other fees, whether the same be or not specified as the property of the government.

Finally, in another part of the act, there is a provision which, though out of its natural place, and thrown in where it is incidentally as it were, yet must be held to settle this point.

The 21st section has for its main object to amend the act of April 14, 1792, so as to make it the duty of the consul, in settling the estate of a decedent, to observe any directions regarding the same, which the deceased may have given "by will or other writing;" and, if such were the direction, then to hand over the effects to any appointee of the deceased; in which case, to the end of protecting the property from local interferenec, the consul is "to place his official seal" on it, and to break and remove the same only at the request of the appointee: "he, the said consul or commercial agent, receiving therefor two dollars for each seal." Appended to the enactment of a particular fee in a particular case is the following general provision: "which, like all other fees for consular service, including all charges for extension of protest, as also such commissions as are allowed by existing laws on settlement of estates of American citizens

by consuls and commercial agents, shall be reported to the treasury department, and held subject to its order."

This enactment, which seems to have come in by amendment, or at least without recollection of the tenor of the 12th section, where it properly belongs, completes the proof, that the act does not repeal nor modify any fees or commissions, except those which it expressly mentions in that sense, and that it leaves all others to stand on existing laws or regulations of the department.

It remains to consider how the act operates on the fees for consular service receivable by consuls and commercial agents.

(257) By the 12th and 21st sections, together, it is made the duty of consuls and commercial agents mentioned therein to hold the proceeds of fees for consular service subject to the order or draft of the government.

What shall be done with the proceeds, by the government, the act does not determine. Of course, it passes to the account of the unappropriated miscellaneous funds of the treasury.

The punishment, indicated for failing thus to account, is "the penalty of being dismissed from office." We have seen that this penal provision is without possibility of legal effect.

But another statute supplies the requisite sanction. The act, required to be performed, is of such nature as to bring the consuls and commercial agents, of whom it speaks, within the purview of the act of August 6, 1846, for the better organization of the treasury, and for the collection, safe keeping, and disbursement of the public revenue; by one of the sections of which, the refusal of any person to pay any draft lawfully drawn on him for public money in his hands, is declared to be an indictable felony. (ix Stat. at Large, p. 62.)

In this case, also, as in that of the penal provision of the 12th section, we may recur in aid to the act of April 14, 1792, and to the bond, which that act requires of consuls, conditioned for the true and faithful discharge of the duties of their office according to law. (i Stat. at Large, p. 256.)

But what are "all other fees for consular service," which, by a seeming afterthought of the act, as incidental to a secondary matter of regulation, and with iteration of enactment of the words of destination of the 12th section, are thus added to the fees, which consuls are to exact hereafter as collectors for the government?

It is obvious that many fees, which it has heretofore been for the interest of the consul to demand on his own account, he must now demand as a mere public duty for the sole benefit of government.

On this point the government, if, in pursuance of the understood theory of the act, it aims, by fees collected, to be indemnified

for its outlay in the salaries, is brought into immediate conflict of interest with every consul, and with every person (258) transacting business with any consul. The merchant or ship master will, of course, desire to pay the least he may; and, while the consul will have no personal inducement to be critical in exacting "fees for consular service," he will incline to inquire what fees, if any, are not consular, and so not the property of the government.

In determining this point, we have to collate all those disconnected parts of the act, which are correlative in sense, to consider them in subordination to the general theory of the act, and to compare them with previous laws, and with the regulations of the department.

I venture to submit only some hasty observations on the subject.

To begin,—the tenor of the act, as we have already seen, except in the two or three cases where it makes change expressly, leaves untouched the question of the particular services for which fees are to be charged.

I now add that it leaves untouched the existing regulations of the department in such matters, and its power to make pertinent new regulations.

The 12th section takes up the tonnage duty, which is to be levied hereafter, in place of a fixed fee, for receiving and delivering a ship's papers; the fee of one dollar for every seaman discharged or shipped; and the fee of two dollars "for *every* certificate;"—and gives them to the government.

The 21st section disposes of a prescribed fee of two dollars for placing the official seal in certain cases on the property of decedents, and removing it when duly requested, and "all other fees for consular service, including all charges for extension of protest, as also such commissions as are allowed by existing laws in settlement of estates:" all of which are given to the government.

The 12th section forbids making any charge for the signing and verification of passports.

In case of a revision of the table of fees, this item deserves reexamination. I think, under the old system, citizens of the United States, travelling in foreign countries on business or pleasure, as a general thing, received from consuls more than (259) they have in return; and that complaints on this point might have come with more grace from the consuls themselves. Now, at any rate, when consuls are to receive salaries from the government, but to collect fees with which to reimburse the public treasury, it is not easy to see why the whole cost of the consular establishment should be cast

on merchants and ship owners, to the exemption of wealthy travellers who may happen to have occasion for the services of consuls.

The 14th section prohibits commissions on receiving or disbursing the wages of discharged seamen, or money advanced to seamen in distress.

The 26th section, in effect, prohibits any allowance to consuls on account of "salaries for clerk hire and office rent;" but this applies only to a few exceptional cases, for which provision has been made in acts of appropriation.

I have compared these provisions of law with the table of fees now charged at one of the largest ports of commerce, and perused the remarks and queries of the consul thereon, as communicated to me by your letter of the 1st instant, and submit the following annotations:

1. In the terms of the 12th section, a fee of "two dollars" is to be exacted, in behalf of the government, on "every certificate;" which must be construed to mean,—certificate under the seal of the consulate.

2. The record to be kept by the consul seems to be an official duty, and of course the fees therefor belong to the government.

3. The making of copies is a clerical, not a "consular service," and whatever may be paid for copies belongs to the consul.

4. Drawing out a power of attorney, bottomry bond, will, or any similar service, is a notarial, not a consular act; and therefor only the certificate upon it would go to account of the government.

5. I should have said the same of extending a protest, but for the phrase in another part of the act,—"a book for the entry of protests, and in which all other official consular acts likewise shall be recorded,"—which seems to cover the fact of extending a protest, and so give the fee to the government. (260) If so, there should be a regulation scale of fees according to the length of the protest, as in England.

6. No "commissions" appear to be disposed of by the act, except on wages advanced to seamen, which are forbidden, and on the estates of decedents, which go to the government.

7. I think the fees collected for the government should be in our own coin, or its representative value in exchange.

Without extending these comments, it will suffice to suggest, whether it be not expedient that the whole subject of consular fees, which the present act leaves in its previous indefiniteness, complicated by the new provisions, should now be deliberately revised in the consular bureau of the department.

Those acts of a consul, for which compensation was charged in the old system, consisted of two great divisions, namely:

1. Fees taken in respect of matters wherein the consul's interposition is required by law, such as the custody of ships' papers, discharge of seamen, payment of wages or relief-money, certificates of invoices and other acts in aid of the revenue laws, and custody of the estates of decedents.

2. Fees taken in respect of matters wherein the consul's interposition is voluntary on the part of the person calling for the service, such as the extension of protests, the preparation of conveyances, arbitration, or bottomry bonds, attending sales, attesting signatures, and furnishing copies of documents.

This division, again, is subdivisible into voluntary acts, which are consular, and others which are purely clerical or notarial: which distinction is expressly recognized by the regulations of the department. (Consular Instructions of 1838, ch. viii.)

To meet all these conditions of the question, other governments, in adopting the system of salaries for consuls, have been compelled to issue very explicit and stringent regulations to secure the full collection of the fees due the government. (See the British "Order in Council" of May 1, 1855, London Gazette, May 11, 1855; and the French, "Ordonnance sur les Droits de Chancellerie," 6 Novembre, 1842, in De Clerq, Formulaire, p. 50.)

How very imperfect our whole system is in the matter of these and other details, will be fully appreciated on a perusal (261) of the contents of De Clerq's "Guide des Consulats" and his "Formulaire."

Remember, it is certain specified fees which the act of congress makes it *"the duty"* of the consul to collect. Is it his duty to collect other fees? Unless his duty in this respect be more thoroughly defined, it is to be feared that comparatively little of those fees, which are uncertain in amount, and for voluntary service, or service the demand for which is voluntary, will or can be compulsorily collected.

The acts of congress do not contain a table of commissions and fees. They prescribe certain fees applicable to some few only of the acts which a consul now performs. All other fees, including those of the largest production, stand on usage and regulation, and require to be reconsidered, in connection with other parts of the new system proposed by congress.

Next comes another most embarrassing question. The act does not profess to abolish vice-consuls and consular agents; on the contrary, it recognizes their continued existence. How are these to be

paid? No salary is allowed them. Possibly it was the original thought of the act to consider a vice-consul or consular agent as the mere deputy, or *locum tenens* of the consul, and to be paid out of the salary of the latter. But the act does not say this.

When a consul is absent from the consular residence on leave, it may be that the substitute, who supplies his place, ought to receive the salary, or a part of it. But the act does not so determine. To the contrary of this, in saying, in substance, that, if he be absent with permission of the president, his salary,—which if he belong to the class of consuls forbidden "to transact business," we may assume to constitute his means of subsistence,—shall continue, it implies that the salary is not to be enjoyed by his deputy. Perhaps the president may order, as the condition of leave to a consul, that he shall provide and pay a deputy. It is not the general rule, however, in other branches of the public service, that a salaried officer, temporarily absent from duty on express leave from the president, pays for the service of a substitute during such absence.

The person, thus left by a consul at the consular residence (262) in *ad interim* charge of the consulate, sometimes bears the name of "consular agent;" but that designation better describes another class of persons, namely, an agent to reside at some other port or place depending on the consul. It would seem to be more exact to call a substitute employed by the consul on the spot his "deputy;" the person employed to fill the place temporarily in his absence, "vice-consul;" and to apply the name "consular agent" to consular officers employed in outposts within a given consular circumscription.

Perhaps the usage of the department, in applying the name "consular agent" to the *suppléant* of an absent consul, officiating as consul *interino* in the absence of the consul *propietario*, grew out of the supposition that the vice-consuls, by inference from the act of 1792, or otherwise, could only be appointed by nomination to the senate: which inference is negatived by the tenor of treaties and of the present act. Of course, no obstacle exists to the systematic use of the term "consular agent," according to its proper acceptation.

Numerous ports exist, which are more or less remote from the location of any consul, but in which, nevertheless, consular services are needed on the spot. Must the consul in every such case go there for the special occasion? If so, he incurs expenses, and leaves his own port without his presence. On the other hand, if the consular services are not such as must of necessity be performed on the spot, it will be inconvenient and expensive for the shipmaster to be compelled to leave his ship, and, perhaps, with his officers and men, as

in extending a protest for instance, to repair to the place of residence of the consul.

Under the old system, the convenience and economy of all parties were consulted by the appointment of a vice-consul or consular agent for such outports, as at Nuevitas, Cienfuegos, and Manzanilla, in Cuba; such agent collecting the fees, and retaining the whole or part as compensation for his services, and transacting the business under the direction of the consul. (Con. Instructions of 1838, chap. iv, s. 7.)

But the future relations of this part of the general subject-matter seem to have escaped the vigilance of congress. The (263) act does not require the consul to travel, at his expense, to and fro between the place of his consular residence and the outposts of his consular circumscription; it does not require him to divide his salary with local vice-consuls or consular agents; it makes no provision whatever for the case.

All these contingencies are of ordinary occurrence, and are provided for in the laws and regulations of other governments paying salaries to consuls, as, for instance, those of the French empire.

Besides which, the act does not profess, in its enumeration of consuls, to be exclusive; there is no such phrase in it as "the following *and no other;*" it abolishes no consulates; it neither in fact nor in pretension deprives the president of the power to retain consuls at places where they now exist, but which are not named in the act, and to appoint them where they do not now exist; as, for instance, to retain the consul at Bilbao or Valencia, at Archangel or Helsinfors, or the commercial agent at Larache, or appoint a new one at the Moluccas, at Setubal, at Trapani, at Newport, or at Bergen. But no salary is allowed by the act to any such consul.

How the act shall be construed in this respect, is not a matter of light moment; for the consuls and commercial agents of the act do by no means cover all the seaports and centres of commerce and resort throughout the world, which are visited by our merchant ships and merchants, or which, in other respects, need the presence and service of some consular representative of the United States.

It certainly was not the intention of the act to cripple the commerce of the country by depriving it of the benefit of vice-consuls and consular agents, or of consuls, at any place where, in the judgment of the executive, such an officer is needed.

Doubtless, at its next session, congress will, in its wisdom, supply these deficiencies by suitable supplemental legislation. Meanwhile, we must construe the act as it stands.

I think the only admissable interpretation of it, as it stands, is

to conclude that the consular officers, of whatever denomination, for whom salaries are provided by the act, are to pay over consular fees which they receive; and that all other consular (264) officers, not thus provided for, have the right to retain all of the lawful fees, which the several acts, including this, and the regulations of the department, allow them to demand.

This construction involves the inconvenience of some of the consular officers being compensated by means of fees, and others by salaries; which inconvenience, however, is of little moment, and need be of but temporary duration, because easily remediable by congress. Meanwhile the change of relative interest, which the new state of facts will introduce between consuls and vice-consuls, or consular agents, seems to demand some corresponding regulations of the department.

It may be proper to observe, in this connection, that the provision of the act which requires the consuls mentioned in it to pay over the fees which they collect, cannot apply to the judicial fees receivable by American consuls in China and Turkey, which are not "consular fees," and cannot be considered by this act as withdrawn from the special destination ascribed to them by the 17th section of the act of August 11th, 1848, giving certain judicial powers to consuls of the United States in China and Turkey. (ix Stat. at Large, page 276.)

Indeed, the consuls at the Barbary ports, and in general in other Mohammedan countries, must not be confounded, in respect of functions or of regulations, with the consuls established in the countries of Christendom. Their condition is referable to peculiar doctrines of the law of nations; and they are governed in many respects by particular treaties and acts of congress. (See Wheaton's Elements, by Lawrence, p. 167, note.)

In my communication of the 25th ultimo, suggestions are made, in the relation of public ministers, as to a clause in this act, which provides, among other things, that no other than citizens of the United States who are residents thereof, or who shall be abroad in the employment of the government, shall be appointed as diplomatic officers, or as "consuls or commercial agents," and that no other than citizens of the United States shall be employed as "vice-consuls or commercial agents," or as clerks in the offices of either.

I reiterate, here, the opinion, that this provision has effect as (265) recommendation merely, and no more. The president, by the advice of the senate, has the sole and complete power to appoint consuls.

In respect of clerks, the provision is one of impossible execution.

How are consuls, and clerks of consuls, capable of speaking and writing, in every case, the language of the country, to be found among citizens of the United States? The government might *produce* such persons, by instituting the grade of "élèves consuls;" but it has not done this; and it is not the duty of consuls to provide for the education of competent linguist clerks, citizens of the United States. Meanwhile, how is the public business to go on? What is to be done by the consuls in France, Spain, Portugal, Netherlands, and their colonies; in Germany, Denmark, Russia, and in all the countries of Dutch, French, Danish, Spanish, Portuguese, America?

Consider, also, those consuls at places where a small salary only is allowed, not sufficient to pay clerk hire, perhaps, and where the consul is permitted to transact business, without which he could not live. He hires and pays his own clerk. Is he forbidden to employ as clerks the only persons whom it is morally possible for him to employ, and whom he most needs in his business? That is the apparent effect of this provision; and of necessity, therefore, it must be treated as directory only, and not mandatory, on the consuls.

As to the consuls themselves, however expedient it be, in general, to fill the consulates and commercial agencies with citizens of the United States, yet places exist where consular services are necessary, but where no American resides, or can be tempted to reside by the grant of a mere commission as consul, or appointment as consular agent. Surely, if the government absolutely needs to have a certain service performed in a particular place, and there be no American to perform it, the service may be performed by a person not American. To assume the contrary, is to push considerations of mere policy to the impolitic result of rendering the performance of the public service impossible.

Suppose that, along the whole coast of Norway, there can be no consuls, citizens of the United States. Are we therefore to (266) understand, that all the acts of congress, which assure consular aid to shipwrecked or distressed mariners, have become a nullity? That is the practical operation of this provision.

When the act says, in words, that the *government* shall not employ as consul or consular agent any person who is not a citizen of the United States, what it says in effect is,—when a citizen of the United States happens, while abroad, to stand in whatever need of consular assistance, he shall not have such assistance, however great his necessity, because no American resides there to be made consul or consular agent.

What would be the legal operation of an act of congress, enacting directly, that no citizen of the United States abroad, who is in dis-

tress, or who needs the service of a notary or counsel learned in the law, shall be relieved or served unless he employs another American, whether such American exist or not?

Cases occur, also, in which the fittest person for the vacant consulate at a given place, and the only person who can be induced to accept, is a merchant temporarily residing there, although by birth and education a citizen of the United States. Is that person, by such abode in a foreign country, disfranchised?

That the general disability enacted by the words,—"no other than citizens of the United States who are residents thereof,"—comprehends residence abroad though retaining citizenship, is proved by the general structure of the phrase, which requires residence at home, in addition to citizenship, as the qualification of appointability. That such "residence," made the condition of disability, includes temporary absence from the United States, such absence as does not lose domicile even, is proved by the only exception to such disability, which consists of those who shall be abroad in the employment of the government *"at the time of their appointment."* How much residence abroad disqualifies? How much at home qualifies? A year, a month, or a day?

"A citizen of the United States, not resident thereof *at the time,"* signifies, in the context where it here stands, one who is in Paris, London, Rome, six months, one month, for the pur- (267) poses of instruction or business. Such person is capable of being appointed Chief Justice of the Supreme Court or elected President of the United States. Is he incapable of "being appointed" to a mere consular agency?

The argument of bare legal construction stands thus:—Laws can be executed only through the instrumentality of agents of execution. There is a body of laws for the protection of the rights of citizens of the United States in foreign countries, the lawful agents for executing which are consuls. Not to appoint consuls at the requisite places would be the effectual nullification of those laws *pro tanto,* just as the omission to appoint judges, marshals, commissioners, and other officers of the law, in a given district of the United States, would have the effect, in that district, to nullify the acts of congress, and produce the suspension therein of all rights and remedies based on the constitution of the Union. If the obstacle to such appointments consist in the words of a particular statute, which, if construed as mandatory, have all the consequences of annulment to the laws in force, we necessarily conclude that congress did not intend such words in a mandatory sense. For all the laws *in pari materia* are to

be construed together, so as from the whole mass to collect the legal intendment of congress.

In deference to this recommendatory enactment in the nature of mere departmental regulation, or to considerations of public policy, the president, in making appointment of a citizen, may look to the fact where he happens at the moment to be; but he has, in my opinion, absolute right to select for appointment without regard to that circumstance, subject always to the approbation and consent of the senate.

It is the constitutional duty of the president to take care that the laws be faithfully executed. It is his constitutional right to nominate, and, with the advice of the senate, to commission, the agents by whom the laws are to be executed. If he cannot find fit agents of one description, he may, nay, he must, employ others, or be false to his high obligations as the Executive of the United States.

You suggest a question arising on the 14th section of the act, which forbids any consul or commercial agent to be directly or (268) indirectly interested in any "profits derived from * * * sending home" discharged seamen or seamen in distress.

The act of February 28, 1803, section 4, enacts that it shall be the duty of consuls "to provide for the mariners and seamen of the United States who may be found destitute within their districts respectively, sufficient subsistence and passage to some port in the United States, *in the most reasonable manner,* at the expense of the United States;" and penalties are enacted to compel masters of vessels belonging to the United States to receive such seamen, on request of the consul, and transport them to the United States, receiving as compensation "not exceeding ten dollars for each person." (ii Stat. at Large, p. 204.)

Now, what is to be done in the case of ports (and such ports exist) where it happens that many seamen are discharged from whaling or other vessels, and no reasonable or direct means exist for transporting them to the United States, except in a vessel belonging to the consul, he being of the class allowed to transact business?

We cannot dispose of this question by the rule that posterior laws repeal prior incompatible ones. The act of 1803, and the acts in amendment of it, are not repealed by the present act; on the contrary, they are expressly recognized as in full force, and especially in this particular matter of the duty of consuls towards seamen of the United States.

I suppose the expression in the act,—"profits derived from * * * sending home" seamen,—refers to the ten dollars paid by the government for every destitute seaman transported to the United

States. This transportation, with the maximum price allowed, is a burden to the shipowner, instead of a profit. If the prohibitory provision of the act be applied without exception, it will in effect relieve the shipowner in many cases, but involve inconvenience to mariners, and additional expense to the United States.

I think this provision, which belongs by its nature to the class of matters of departmental regulation, must be held in law to be directory only, not mandatory, and so treated by the department.

(269) Question has been suggested, also, as to whether the discretion given to consuls, in certain cases, by the act of July 20, 1840, regarding the amount of wages to be exacted of the shipmaster when the seamen are discharged in foreign ports, still continues. I think it does: the present act does not seem to contain anything affecting that point.

There is a provision of the act, referred to already in another relation, namely, the main one of the 21st section, which demands consideration. It is in the following words:

"The act of April 14th, 1792, concerning consuls, &c., is hereby so amended that, if any American citizen dying abroad shall, by will or any other writing, leave special directions for the management and settlement by the consul of the personal or other property which he may die possessed of in the country where he may die, it shall be the duty of the consul, where the laws of the country permit, strictly to observe the directions so given by the deceased. Or, if such citizens so dying shall, by will or any other writing, have appointed any other person than the consul to take charge of and settle his affairs, in that case it shall be the duty of the consul, when and so often as required by the so-appointed agent or trustee of the deceased, to give his official aid in whatever way may be necessary to facilitate the operations of such trustee or agent, and, where the laws of the country permit, to protect the property of the deceased from any interference of the local authorities of the country in which he may have died; and to this end it shall also be the duty of the consul to place his official seal on all or any portion of the property of the deceased as may be required by the said agent or trustee, and to break and remove the same seal when required by the agent or trustee, and not otherwise."

In the execution of this provision, consuls will need to exercise much discretion and care.

We are to presume this enactment adds to, or otherwise changes, the pre-existing law; and the question is, in what respect?

The provisions of the act of April 14, 1792, in relation to the matter, are, that, in certain cases, if any citizen of the United States

die abroad, the consul, within whose consulate it (270) happens, shall take possession of all "personal estate" of the deceased in the country where he dies, inventory it, sell it, collect and pay local credits and debts, and remit the balance to the treasury of the United States, to be held in trust for the legal claimants.

The contingencies, in which the consul may thus collect the assets of a decedent, free them from local incumbrance, and remit them to the treasury, are three, namely: 1, If the deceased shall have left no "legal representative" within the consulate; 2, no "partner in trade;" and 3, no "trustee by him appointed to take care of his effects."

If, at any time before the collection and transmission of the assets shall have been completed, the "legal representative" of the deceased appears, then the authority of the consul in regard to the estate ceases, and the management of its passes into the hands of such legal representative.

The new act provides, in the first place, that if the deceased shall "by will or any other writing leave special directions for the management and settlement, *by the consul,* of the personal or other property which he may die possessed of in the country where he may die," it shall be the duty of the consul to observe those directions.

The act does not say *what consul;* but, by collation with the preexisting law, we may construe this to mean the consul within whose consulate the party dies.

The act in effect assumes further, that the consul is to take possession of "personal and *other* property." That is to extend the jurisdiction of the consul beyond what he previously possessed, and into doubtful regions.

It is perfectly clear that nothing in the previous acts empowers the consul to sell any *real estate* of the deceased; nor can the provisions of the present act communicate such power, even if directed by will; for the will would have to be proved and allowed as such in order to pass real estate. Nor can the act be construed to intend what it apparently says, that in the "management and *settlement*" of the estate, the consul is to observe any such directions as the deceased may have left "by will or any other writing." If there be a will, or any writing (271) possessed of testamentary value, there will be an executor, or administrator with the will annexed, and he must settle the estate according to law.

I presume the sole effect of this part of the section to be, that, in the performance of such acts regarding the estate as the consul may, by virtue of the act of April 14, 1792, lawfully perform, namely, taking the custody of the property, preserving it from waste, collect-

ing credits, paying local debts, and selling the *personal* estate for transmission to the treasury, the consul shall, in the absence or non-appearance of the executor, co-partner, or other "legal representative" of the deceased, observe such directions as the latter may have given him as to such mere provisional acts of consular intervention in the estate.

The new act provides, in the second place, that "if such citizen on dying shall, by will or any other writing, have appointed any other person than the consul to take charge of and settle his affairs," as "agent or trustee," then the consul shall officially aid such agent or trustee in his duty, and shall, so far as he lawfully may, secure the property of the deceased to such agent or trustee, as against the interference of the local authorities.

This enactment, like the foregoing one, must be understood as having reference only to such acts of a lawfully appointed "agent or trustee of the deceased," as any such "agent or trustee" may perform in the absence of the "legal representative" of the deceased, who, on his appearance, will supersede, not only the consul, but any such provisional agent; and in case of controversy between such agent or trustee and the legal representative of the deceased, it will be the duty of the consul to aid the latter, to whom the paramount and exclusive right to control the property belongs in all circumstances.

To undertake to carry the authority of the consul beyond this point, or in any other directions, would be to involve him in hazardous responsibility.

A citizen of the United States is, in almost every supposable case, a citizen of some state or territory of the United States, or of the District of Columbia. His private rights of property and of person depend, all but universally, on the law of his (272) state, of his territory, or of the District of Columbia. No act of congress makes general provision for the forms of deeds or wills, the distribution of estates of decedents, the regulation of contracts, or other things of that nature in the affaires of a citizen of the United States. No act of congress can constitutionally do this in regard to the citizen of any state, whatever it may do as to the citizen of a territory, or of the District of Columbia. I, for instance, am a citizen of the United States, but a citizen, also, of the state of Massachusetts, whose laws govern my personal succession. In this respect, congress has no constitutional power whatever, except in some one of my special relations to the federal government, as in the imposition of taxes, and in the other few and limited matters of federal resort. That general immunity from federal legislation in ordinary matters of private in-

terest is my own imprescriptible right: it is also the sovereign right of my state. In like manner, it is the right of my heirs-at-law. I do not lose this right, nor do they, by my temporary absence from my state in public employment, or as a merchant, or traveller, or any other way, except such as may give me citizenship or local domicile in some foreign country, and thus place me and my personal rights, and those of my succession, under the jurisdiction of such foreign country. These positions are the elementary law of the condition of citizens of the United States.

Furthermore, it is the all but universally received principle of the international law private, that the real estate of a decendent goes to his heirs-at-law, and that his personal estate is to be distributed according to the law of his domicile. (Story's Conflict of Laws, ch. ix; Felix, Droit International Privé, p. 161, Phillimore on Domicile ch. i.) This rule cannot be changed by an act of congress; for its continued existence, in so far as regards our own citizens, is of the rights of the states.

Now, this provision of the act, in requiring the consul to settle the estate of a decedent according to his directions "by will *or any other writing,*" or to deliver up the property to any agent or trustee, whom he may have appointed "by will *or any other writing,*" makes reservation of "the laws of the country," and so, perhaps, by implication, admits exception of the laws (273) of the decedent's domicile which, in pursuance of the law of nations, is respected by every country in Christendom.

But, after all, this law of the domicile is the great exception, which an act of congress cannot empower consuls to disregard, and which they will disregard at their proper peril.

When the present act requires the consul to deliver up the estate of a decedent, dying within his jurisdiction, to an appointee under his "will," if it mean his executor, that the consul may do; because by "will" is understood a valid testament, lawfully made and executed, by a person who is in all respects *compos testandi:* which question must be judged by the law of the decedent's state.

But, when the act proceeds to say that the consul must obey such directions, regarding the settlement and the disposal of the decedent's "personal or other property," as the decedent may have given him by "will *or any other writing,*" and deliver it over to, and protect in the possession of it, the agent whom the deceased may have appointed " by will or any other writing," its injunction must be understood with the necessary legal reservations.

Except in the mere temporary settlement, collection, and custody of the property of a decedent, no agent appointed by will or

otherwise, no public officer empowered by act of congress, can safely venture to deal with a decedent's estate; for either that estate has been disposed of by lawful testamentary disposition to devisees or legatees, or it has become the property of the creditors of the decedent, or it has descended upon persons legally entitled by marriage or kinship; and, in either case, if it be personal property, it must pass through the hands of a duly appointed and judicially recognized executor or administrator. If we could suppose that the act intended to go beyond this, it would be necessary to scrutinize the force of the expression,—"will or any other writing."

"Any *other* writing" signifies some writing, which has not the legal effect of a will, or it means nothing. In the phrase "will or any *other* writing," the "other" excludes a will.

Whether the alternative in this provision could have any possible effect on the estate beyond the legalization of acts of (274) temporary custody, would depend upon the question what those writings are, *other than a will,* by which a citizen of one of the states of this Union, who may happen to die abroad, can impart to his personal property, after his decease, a direction different from that prescribed for intestacy by the law of his state.

What is that writing, not possessed of the legal effect of a will of personal assets duly executed by a competent person, by means of which a citizen of New York or of Louisiana, dying in Paris during a temporary sojourn there, can take his property out of the ordinary course of succession? I think it behooves the consul to consider this question well, before he presumes to follow, *in anything beyond the acts of custody, settlement, and collection* prescribed by the act of April 14, 1792, directions of the decedent by writing not possessed in law of the force of a testamentary disposition, or directions of any agent of the deceased, however nominated, unless that agent be the duly appointed executor or administrator. Otherwise, the consul may be called to account by some creditor of the deceased, or by a lawfully appointed executor of his, or by his family and heirs-at-law.

In short, the consul should bear constantly in mind that he cannot *as consul* administer on the estate, nor as consul aid any other person in so administering, without *judicial* authorization; and that the whole extent of his consular authority is to guard and collect the assets of a decedent, and to transmit them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of here pursuant to the law of the decedent's state.

Finally, it may be proper to observe, as to the provision of the 25th section, by which the president is "authorized," if he see fit, to bestow "the title of consul general" upon any consul of the

United States in Asia or Africa, that this provision is of doubtful tenor, if it be intended to imply that, without it, the president cannot, with the advice of the senate, at any time appoint a public officer of the class of consuls, and bearing the title of consul general.

In illustration of this remark, we have the fact that, in the civil and diplomatic appropriation act of the last session of (275) congress, there is an appropriation for the salary of a consul general for the British provinces in North America, while the general act supposes that consulates of this rank are to be confined to Asia and Africa. (x Stat. at Large, p. 763.)

In truth, the office of consul general may be given, as a mere titular designation, to imply rank; but it more properly signifies an office with special functions, well defined by the law of nations and public usage. The consul general superintends and directs, according to the instructions, general or special, of his government, the consuls within a particular jurisdiction or country. (DeCussy, Réglements Consulaires, p. 70; Moreuil, Agents Consulaires, p. 18.)

Such an officer possesses utility, and particular application in foreign countries of extensive but definite circumscription, in which there is no proper diplomatic representative of the government, such as the several great European colonies, or other governments of that order, in Asia, Africa, and America. In all the countries of Europe, and in such of those of America and Asia as enter fully into our treaty system, we have, or may have, a minister, of whatever title, who is of course, by public law, superior in rank to consuls, and their medium of communication with the government. But, in the foreign dependencies of European powers, many of which are in themselves great states, with all the mechanism of local authority, and in sundry cases enjoying semi-independence under the administration of a governor, a captain general, or a pacha, it becomes necessary that some consular person should have power to communicate with the supreme colonial or feudatory chief, in behalf of his collegues and his countrymen; and on the consul residing at the seat of government will naturally devolve the functions, if not the title, of consul general. (De Clerq, Guide des Consulats, p. 28.)

These considerations indicate that the selection and appointment of a consul general, even more emphatically than that of consul, must belong to the treaty-making power in every political society, the power which initates in foreign relations, and which our constitution has intrusted to the president in consultation with the senate.

(276) Permit me to add, in conclusion, that the suggestions, which official duty compels me to make, in regard to so many of the provisions of this act, of careful discrimination between what is man-

datory in a statute, and what is recommendatory only, are made with entire general deference and respect for the legislative will of congress.

It happens continually, that phrases, of doubtful apparent significancy in the relation of constitutional powers, are found in the acts of congress. It would not be convenient to establish, as a rule, that the president must refuse to approve all such acts, however useful and just on the whole they may be. It is more convenient to follow the customary routine of the government, of reducing any such questionable phrase to its true constitutional value by construction, when the law comes to be construed and administered. Thus, when the statute says, that every collector of the customs shall have authority, with approbation of the secretary of the treasury, to employ inspectors, (act of February 4, 1815, s. 5,) it must be construed to mean that the secretary may appoint and remove such inspectors; because the power, here thus in words given to collectors, can by the constitution be devolved only on the president or a head of department. (Mr. Legaré's opinion, March 24, 1843, vol. ii, p. 1577.)

So when, by the late convention with France, or any other, it is said, in words, that officers with consular functions and rights, vice-consuls, and consular agents, may be appointed by the consul, it means appointed by the secretary of state on the presentation of the consul, and removable by the same authority.

By affixing his signature to an act or treaty containing such phrase, the president does not effect any change in the constitution. He cannot take constitutional power in virtue of any clause of an act of congress; nor can he so surrender it. The constitutional power of each of the three great departments of the government, respectively, belongs to the offices, not the officers, and cannot, by any act or words of theirs, be withdrawn from the permanent and pervading authority of the constitution.

(277) We know how difficult a task it is, in remodelling any great department of the public service, to give apt expression to all which is included in the assumed theory of the act. It requires much circumspection and reflection to adapt successfully the new parts of the system to the old ones; many *lacunae* will remain to be filled up; some things will be disturbed, which it was not intended to touch; and when the judge or the administrator comes to deal with the act of legislation as a practical matter, and to review all its provisions in their relation to one another, and to the pre-existing provisions of law, he finds himself driven, by inexorable force of logic, into consequences of construction not anticipated by the legislator. These unforseen consequences increase in degree or number in proportion as

the legislative body indulges in the prevailing disposition to enter into the field of mere administrative regulations, instead of devoting its attention to the superior and more important and much pretermitted duty of prescribing organic rules and generic principles of administration. These final reflections it seems not out of place to submit, on your account as well as my own, in explanation and apology of the many questions of construction, which have arisen, and could not fail to arise, on a measure of so much magnitude as that of remodelling the diplomatic and consular systems of the United States.

Whatever of inevitable imperfection there may be, in this initiatory enactment in the right direction, will, of course, in due season, receive the attention of congress.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII. p. 342 (Cushing)

FUNCTIONS OF CONSULS

A consul may be authorized to communicate directly with the government near which he resides; but he does not thereby acquire the diplomatic privileges of a minister.

Nor does he, as consul, acquire such privileges by being appointed, as he may, at the same time chargé d'affaires.

To the question whether a consul can solemnize marriage or not, as consul, it is wholly immaterial whether he be or not a subject of the foreign government.

The exterritoriality of foreign consuls in Turkey and other Mohammedan countries is entirely independent of the fact of diplomatic representation, and is maintained by the difference of law and religion; being but incidental to the fact of the established exterritoriality of Christians in all countries not Christian.

Consuls, as international commercial agents, originated in the colonial municipalities of the Latin Christians in the Levant, which municipalities were self-governing through their "consuls," the ancient title of municipal magistrates in Italy.

Rights of private exterritoriality having ceased to exist in Christendom, foreign consuls have ceased, mostly, to be municipal magistrates of their countrymen there; but they still continue not only international agents, but also administrative and judicial functionaries of their countrymen, in countries outside of Christendom.

Attorney General's Office,
July 14, 1855.

Sir: Your communication of the 10th instant encloses to me a despatch from Mr. Ritter, the consul of the United States at Frankfort on the Mayn, regarding the solemnization of the marriage cere-

mony by foreign consuls, which despatch was induced by the contents of my opinion on that subject of the 4th of November.

Mr. Ritter discusses at length, and with much intelligence, the considerations, which, in his judgment, render it desirable that consuls in Germany, especially at the points of collection or embarcation of emigrants, should possess the power to legalize matrimony. There is force in what he says. Nevertheless, it remains indisputable that consuls do not in fact possess the power, and it cannot be imparted to them by any act of the department of state.

They might possibly acquire it in three ways, namely: first, (343) by municipal act of any foreign government giving legality to a marriage within it so celebrated, in which case there would be nothing in our law, or in our public policy, to forbid a consul officiating in that relation; secondly, *perhaps*, specially by treaty, or generally by act of congress. But these are questions of political expediency, not of positive jurisprudence.

Mr. Ritter suggests that, in the opinion referred to, notice was not taken of "the difference between consuls, who are subjects of the state where they reside, and those who are not such subjects."

Undoubtedly such difference exists, since a subject cannot escape his local obligations by means of an appointment as foreign consul; but that is immaterial to the question; because the consul does not, by reason of his being a foreigner, become therefore authorized to solemnize marriage. If, indeed, being a subject of the state, he have power as a local magistrate to solemnize marriage, or, being a foreigner, he have the same power as clergyman, he may do it; but, in either case, not in his capacity of consul.

Mr. Ritter suggests another point of consideration, namely, "the difference between consuls residing in a state where there is a minister representing the government by whom they were appointed, and consuls residing in a state where there is no minister," and he indicates the peculiar importance of this point in Germany.

It is true, that, in a country where his government has no minister, the *duties* of the consul expand of necessity into a larger field, because he will be called upon to communicate with his own government, or with that near which he resides, in matters which would otherwise devolve on a minister; but that circumstance does not cure his legal incapacity *as consul* to solemnize marriage without authority of the local government.

The United States may, with consent of the other party, superadd to the regular duties of consul any of those of minister.

There are two great classes of cases in which this fact exists, and

might well be systematized, or at least more explicitly recognized in our consular stipulations with foreign governments.

(344) One is, that of the transmarine possessions of sundry of the states of Europe. Here, as incidentally intimated in my opinion of the 2d ult., on the subject of the consular establishments of the United States, many cogent reasons dictate that we should insist on the concession to our consuls, by such states, of the right to address the colonial or provincial governor. There is nothing in the law of nations to prevent this. It is informally admitted in many colonial governments. It is convenient for all parties. It is a consular right exercised by treaty in the great pashalics of the Turkish Empire.

We have recently made provision to the same effect in treaty with a Christian power, namely, the Netherlands. And, this government having thus wisely relinquished its long-standing scruples on this point, we may reasonably expect similar liberality in future commercial negotiations with Great Britain and with Spain. In fact, the consul general of Great Britain now possesses, by convention, the power in Cuba. (Riquelona, Derecho Internacional, p. 523.)

The other class of cases of this nature is that of a consul residing near a metropolitan government where there is no minister, either because of temporary cessation, or because inducements have not existed for the interchange of diplomatic representatives between such government and the United States. In this case it becomes the office, perhaps it may be said the right, of the consul, to place himself in direct communication with the political authority of such government. Here, as in the other case, the fact occurs, and is of common convenience; it is not inconsistent with the public law; and, so far as regards the United States, it has example in treaties, for instance, in our last consular convention with France.

It is a thing of manifest necessity, as between us and those of the countries of Germany, with which our relations are entirely amicable, without calling for permanent diplomatic representation. The German Bund, though in some features resembling our own Federal Republic, yet differs essentially in this, that, in the former, the federal authority, in matters of peace and war, acts upon states, not individuals, and of course each state retains the power of foreign representation and (345) negotiation. Hence, if we do not see cause to interchange ministers, we may yet well reciprocally enlarge the consular functions, in our relations with such states as Bavaria, Saxony, Wurtemburg, Hanover, the Hessen, the Mecklenbergs, or any other of the members of the Bund.

Meanwhile, it would not in either of these classes of cases fol-

low, that because a consul of the United States in Bavaria, or one of Bavaria in the United States, may be admitted to address the government, that therefore he becomes a diplomatic personage, with international rights as such, and among them that of exterritoriality. If his commission be that of consul only, if his public recognition be an *exequatur*, the foreign consul is subject to the local law in the United States; and our own consul in the foreign country, if invested in any case with quasi exterritorial rights, does not derive these from the law of nations, but only from the special concession, by general law or otherwise, of the particular foreign government.

If, indeed, the United States see fit in any case to confer the function of chargé d'affaires on their consul either with or without limitation of time, as they may lawfully do, that is, to superimpose the office of minister on that of consul, then he has a double political capacity, and though invested with full diplomatic privileges, yet becomes so invested as chargé d'affaires, not as consul; and the fact of such casual duplication of functions does not change the legal *status* of consuls, whether they be regarded through the eye of the law of nations, or that of the United States.

Mr. Ritter observes:

"In Egypt, Tunis, Tripoli, China, The Islands of the Pacific, consuls enjoy all the diplomatic privileges. The motive is not only in the difference of law and religion with ours, but also in the absence of other diplomatic representatives."

This observation involves a double error. In the case of China and Turkey, for instance, our consuls have not, *quâ* consuls, any "diplomatic privileges" except such as they might have in France, during the absence of a minister; such *exterritorial*, not diplomatic, privileges, as they really enjoy, they enjoy, not because they are consuls, nor because of the absence **(346)** of proper diplomatic representatives in those countries, for we have them,—but because they are citizens of the United States. And the true explanation of the diplomatic rights appertaining to consuls in the Mohammedan states, whether independent ones, like Morocco and Muscat, or subject to the suzerainty of the Porte, like Tripoli, Tunis, and Egypt, and so of the Pacific or Indian Islands, is that these states are not Christian, are not admitted to a full community of international law, public or private, with the nations of Christendom.

I might demonstrate historically what, in this place, it will suffice to affirm, that the institution of consuls, in their present capacity of international agents, originated in the mere fact of differences in law and religion, at that period of modern Europe in which it was customary for distinct nationalities, co-existing under the same

general political head, and even in the same city, to maintain each a distinct municipal government.

Such municipal colonies, organized by the Latin Christians, and specially by those of the Italian Republics, in the Levant, were administered, each by its *consuls,* that is, its proper municipal magistrates, of the well-known municipal denomination. Their commercial relation to the business of their countrymen was a mere incident of their general municipal authority. Such also, at the outset, was the nature of their political relation to other co-existing nationalties around them in the same country, and to that country's own supreme political or military powers.

The consuls of Christian states, in the countries not Christian, still retain unimpaired and habitually exercise their primitive function of municipal magistrates for their countrymen, their commercial or international capacity in those countries being but a part of their general capacity as the delegated administrative and judicial agents of their nation.

This condition of things came to be permanent in the Levant, that is, in Greek Europe and its dependencies, by reason of the tide of Arabic and Tartar conquest having overwhelmed so large a part of the Eastern Empire, and established the Mohammedan religion there. But the result was different in Latin Europe, because the modern nations, formed in this quarter (347) out of the broken fragments of the Western Empire, being Christian, and thus deriving their religion and their civilization from the same fountain-head of Rome, settled into something of approximation to the one great political community, under the influence, potential when combined, of the military power of the Frankish or Germanic Emperors, and the moral power of the Papal See. Thus it was that the mass of legal ideas, which we now call the law of nations, came to exist, and have authority. It is, in its origin at least, the system of public law of Latin or Western Europe.

The approximative political unity of Western Europe was obstructed, at first, by the antagonism of the Celto-Romanic and the Germanic races, and was threatened with complete dissolution when that original antagonism reappeared in the separation of some of the Germanic populations from the Papal See, under the popularly assumed religious title of Protestants. But, after thirty continuous years of reciprocal devastation and slaughter, the states of the old and the new faith concluded a truce at least, if not a peace, and agreed, while acquiescing in the fact of religious difference, to maintain approximate unity of public law, and thus by subordinating the religious idea to the legal one, to live together in some sort, as they

have continued to do, with only occasional spasms of fanatical intolerance breaking out into civil or foreign war. At a late period, Russia, though of Greek faith, came into the European system of public law, with the less difficulty indeed, for the reason that Latin Europe and Greek Europe alike nourished the legal traditions of the Roman Empire though these be derived in the former case from Rome, and in the latter from Constantinople, it being doubtful which became the most barbarized in the dark ages, Eastern or Western Christendom,—in which the modern civilization first became consolidated,—and which the most frankly accepts at this day a tolerant legalism as the balance of intolerant religionism.

However this may be, certain it is that by the combination of Romanic law and Christian faith it is that we have come to have a common public law, under whose gradual operation claims of private exterritoriality soon fell into desuetude among (348) the governments of Christendom; Italians in England and Englishmen in Italy, at length submitted to the local law; foreign colonial nationalities finally ceased to exist of right; their consuls proceeded to sink from the condition of municipal functionaries into that of mere commercial or semi-diplomatic one; and thus in process of time, by traditional usage, by positive provisions of local law, and by treaty stipulations, the existing legal character with its limited rights, was fixed on the foreign consuls mutually accredited in the countries of Christ-Europe and America.

In our relations with nations out of the pale of Christendom, we must and shall retain for our own citizens and consuls, though we cannot concede to theirs, the right of exterritoriality.

There is one European country, and, so far as my observation goes, but one, where the exterritoriality, claimed by Christians in all Mohammedan governments, is reciprocated by the Christians. Spain has conceded to the subjects of Turkey, Morocco, and Tripoli, the same immunity which these last have conceded to Spaniards, that is, the privilege of being subject, each in the country of the other, only to the authority of their own consuls. (Riquelona, Derecho Internacional, tom. i, p. 303.)

Religion is the chief representative sign here; and it is an element of the question of public law; because, while the different denominations of Christianity may continue to sustain, as among themselves, a certain degree of imperfect mutual endurance, yet, so fierce is religious prejudice on every side, that there is no apparent possibility of a half-peace even, as between them and other religions, more especially the Mohammedan. If the former could tolerate the

latter, the latter could not the former, except in conditions of military subjugation as in English India.

But the critical fact is the difference of law. The legislation of Mohammed, for instance, like that of Moses, is inseparable from his religion. We cannot submit to one without also undergoing the other. The same legal incompatibility exists, for one reason or another, between us and the unchristian states not Mohammedan.

Whereas, Christendom, on the other hand, in all its subdi-(349) visions of race, nationality, and religion, is the common heir of the political ideas, and especially the legislation, of the Roman Empire; for the Institutes and Pandects themselves, though comprising the sum of the legal science of Rome, were compiled and promulgated at Constantinople, and constitute the broad foundation of the jurisprudence, public and private, of the whole of Christendom.

When the countries now Mohammedan shall be subjugated to the doctrines of the Roman law,—whether by the arms of Eastern or the arts of Western Europe, is of secondary moment to us, provided it be done,—and not until then, they can be admitted to the same reciprocal community of private rights with us, which prevails in Christian Europe, and in America. Until that event happens, Turkey, and other Moslem states in Africa or Asia, may, like China and Japan, enter into the sphere of our public law in the relation of government to government, but not in the relation of government to men. That full interchange of international right is admissible only among the nations which have unity of legal thought, in being governed by, or constituted out of, the once dissevered, but since then, partially reunited, constituents of the Graeco-Roman Empire.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII, p. 349 (Cushing)

DISCHARGE OF SEAMEN

Masters of American vessels cannot lawfully discharge seamen in foreign ports without intervention of the consul.

It does not help the matter to allege that the seamen consent, or have misconducted themselves, or are not Americans: of all that it is for the consul to judge.

Attorney General's Office,
July 17, 1855.

Sir: Your communication of the 10th instant transmits to me correspondence between Edward Gordon, commander of the (350)

schooner Humboldt, employed on the survey of the coast of the United States, and the consul of the United States at Rio, respecting the discharge, by Mr. Gordon, of certain seamen at that place, for the purpose of having proper instruction on the subject addressed by me to the district attorney of the United States of the Northern District of California.

It appears that Mr. Gordon discharged the mate and two seamen of the Humboldt, at Rio, by his own mere authority, and without the intervention of the consul of the United States. Having done it, he gave the consul notice of the fact, saying that the mate was discharged for drunkenness, and the two seamen with their own consent, they not being Americans. In all this Mr. Gordon acted inconsiderately and unlawfully. He had no right to determine of himself the facts on which he assumed to act, nor to consummate the discharge without intervention of the consul.

As Mr. Gordon is employed by authority of the treasury department, and as much of the evidence in the case will be found there, it seems to be most convenient to commit the whole case to the secretary of the treasury. I have accordingly transmitted the papers to that department.

I am, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII, p. 367 **(Cushing)**

FOREIGN ENLISTMENTS IN THE UNITED STATES

Attorney General's Office,
August 9, 1855.

Sir: (Extract) **(379)** Beyond all this, it would seem that the legal advisers of the British government conceive that the official agents of one nation may rightfully do, within the territory of another, anything which is not by the domestic statutes of the latter declared to be a municipal offence, indictable as such before the courts of law. If such an idea be entertained by the British government or its law-officers, certainly it is a mere delusion, possible to exist only in minds shut up in the narrow sphere of the technical common law of England.

How *insular* that law is,—and how defective the knowledge it imparts even for the purpose of domestic, and still more of foreign, administration,—the jurists of England themselves have too frequently had cause to observe. (See ex. gr. Phillimore's Internat. Law, pref. p. xi; Chitty's Practice, pref. p. v. note.)

Nothing can be plainer than the position that the objects of the municipal law in such a case are domestic only. In con-(380)stitutional governments, it confers on the executive, in the particular matter, powers which he would not otherwise possess; and it provides the means of repressing all acts of individual persons, whether foreign agents or not, which may contravene the policy, or infringe the rights, of the country. But the municipal law cannot reach the foreign sovereignty, by whose orders the individuals in question, if public agents, act in violation of the local sovereignty. Yet is not the foreign sovereign, as sovereign, the chief wrong-doer? And is the wrong to be redressed in no way except by punishing the subordinate agents of the wrong, if there happen to be any municipal law to reach the case? And if there be no such law, is the injury to go unredressed? Clearly not: for governments in their international acts are directly responsible to governments.

But the radical absurdity is in assuming that a foreign government may lawfully do on the territory of another government, or cause to be done, anything whatever, which is not made penal by local statutes. This assumption is altogether groundless. The law of nations is international, not domestic or municipal: it is the *ensemble* of international conventions, usages, and received opinions, aided, in case of need, by the doctrines of abstract justice and of universal reason. It is not restricted to the bounds of acts of parliament or acts of congress. International right would be reduced to a singular condition indeed, if it consisted of those things, and those things only, which, for consideration of internal convenience, Great Britain or the United States may have happened to enact as law by means of their legislative assemblies. It is not so, either affirmatively or negatively. Things are affirmed in their statutes which are not according to the law of nations; and there are many points of international law which have not been affirmed by their statutes.

A single pertinent illustration of the latter will suffice.

There are two matters of sovereign right, which are alike in character, and are naturally associated in the writings of international jurists,—namely, the right to prevent either the transit (381) of foreign troops, or the enlistment of soldiers for foreign service. In Great Britain and the United States we have municipal laws to repress and to punish the individual agents, official or unofficial, of the latter invasion of our sovereign rights; but none to punish, or even to repress, the former. May it therefore be done with impunity? Nay, can it be done without national offence? It may, according to the premises assumed in the other case. If all acts of foreign enlistment may be rightfully done, provided there be no prohibitory statute,

and if there be any, then all such as the statute does not reach,—of course all acts of foreign military transit may be rightfully performed, and there is the end of the sovereignty of every nation, which does not happen, like Great Britain, to be surrounded by water.

In truth, the statute in all these matters is of but secondary account. The main consideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe; and of course not to tolerate enlistments in the country by either of belligerents, whether for land or sea service. If there be local statutes to punish the agents or parties to such enlistments, it is well; but that is a domestic question for our consideration, and does not regard any foreign government. All which it concerns a foreign government to know is, whether we, as a government, permit such enlistments. It is bound to ask permission of us before coming into our territory to raise troops for its own service. It has no business to inquire whether there be statutes on the subject or not. Least of all has it the right to take notice of the statutes only to see how it may devise means by which to evade them. Instead of this, it is bound, not only by every consideration of international comity, but of the strictest international law, to respect the sovereignty and regard the public policy of the United States.

Accordingly, when, at the commencement of the great European struggle between England and France, near the close of the last century, the French Convention assumed to recruit (382) marine forces in the United States, it was held by President Washington, and by his Secretary of State, Mr. Jefferson, as explained in the correspondence hereinbefore quoted, that by the law of nations, in virtue of our sovereignty, and without stopping to enact municipal laws on the subject, we had full right to repress and repel foreign enlistments, and *e converso*, that the attempt to make any such enlistments was an act of gross national aggression on the United States.

When a foreign govenment, by its agents, enters into the United States to perform acts in violation of our sovereignty, and contrary to our public policy, though acts not made penal by municipal law, that is a grave national indignity and wrong. If, in addition to this, such foreign government, knowing that penal statutes on the subject exist, deliberately undertakes to evade the municipal law, and thus to baffle and bring into disrepute the internal administration of the country, in such case the foreign government not only violates but insults our national sovereignty.

I repeat, then, that, if it were to be supposed that the British government had so far forgotten what is due to its own dignity, as to

instruct its agents within the territories of the German Bund, in the Netherlands, in the United States, to enlist recruits without respect for local sovereigny, but with care to avoid or evade the letter of local statutes, instead of diminishing, that would aggravate the injustice and illegality of the proceeding in the eye of the law of nations, and the intensity of the public wrong as regards the neutral states thus converted, without their consent, into a recruiting ground for the armies of Great Britain.

Such instructions would be derogatory to our public honor in another respect. They presume that the United States, without becoming the open ally of Great Britain, will, by conniving at the use of their territory for belligerent purposes, while professing neutrality, thus carry on, as already intimated, a dishonorable war in disguise against Russia.

It appears, however, that the British government, finding it impossible to keep the ranks of its army filled by voluntary enlistments, and being loth to encounter the responsibility of a (383) law for conscription, for draughts on militia, for periodical service of its able-bodied men, or for any other systematic method of raising troops from its own population, introduced into parliament a bill entitled "An act to permit foreigners to be enlisted, and to serve as officers and soldiers in her majesty's forces," but which was in fact a bill to authorize the government to employ agents to carry on recruiting service in the neutral states of Europe and America.

The law was earnestly objected to in its progress, as insulting to neutral states and derogatory to the national dignity, but was passed, nevertheless, on the 22d of December, 1854. (Hansard's Debates, third series, vol. 136, passim.)

At an early day after the passage of this act, measures were taken to recruit officers and men, for a proposed foreign legion, in the United States, those measures being publicly pursued under the official responsibility of Sir Gaspard le Marchant, lieutenant governor of the province of Nova Scotia. A military depot was established at Halifax for the reception and enrollment of recruits; and Mr. Howe, a member of the provincial government, with other agents, came into the United States to make arrangements for engaging and forwarding the recruits, chiefly from Boston, New York. and Philadelphia. Subsequently, corresponding arrangements were made for collecting and forwarding recruits from the western states, by Buffalo or Niagara, through upper Canada.

These acts were commenced and prosecuted with printed handbills and other means of advertisement, and recruits were collected in depots at New York and elsewhere, and regularly transported to

Canada or Nova Scotia, with undisguised notoriety, as if the United States were still a constituent part of the British Empire. Of course, they attracted great attention, and the various measures, whether legal or political, proper to put a stop to them, were instituted by your direction, through the instrumentality of the foreign or legal departments of the government of the United States.

In the course of the investigations which ensued, among the facts brought to light are some, in the documents referred to me, which unequivocally implicate, not only the British consuls, (384) but the British minister himself, in the unlawful transactions in question, and so call for inquiry as to the rights of this government in reference to them and their government.

In the application of the general rules of law to the offences committed, it is necessary to distinguish between the case of any of the consuls and that of the minister.

The several district attorneys of the United States, within whose jurisdiction, respectively, the cases occurred, very properly assumed that the consuls were subject to indictment for infraction of the municipal law, and have proceeded accordingly, prosecutions having already been instituted in the Southern District of Ohio, against the consul at Cincinnati, and in the Southern District of New York, against an officer of the consulate of New York.

Nothing is better settled by adjudication in this country, than that foreign consuls are subject to criminal process for violation of the municipal laws. (United States v. Ravara, ii Dall. 297. Mannhart v. Soderstrom, i Bin. 144; Commonwealth v. Kosloff, 1 Serg. & R. 545; State v. De la Foret, ii Nott. and Mc. 217.)

These adjudications are in exact conformity with the law of nations in regard to consuls, as understood and practiced not less in Great Britain than in other states of Christendom. (See ante, p. 18; also, Kent's Com., vol. i, p. 44; Wheaton's El. by Lawrence, 305.)

The only privilege which a consul enjoys in this respect, in the United States, is that awarded to him by the constitution, of being tried by the federal courts: the effect of which is, that his case remains within the control of the general government, which may deal with it according to the convenience or the exigencies of its foreign policy, without impediment from the authority of any of the individual states of the Union. (Const. Art. iii, sec. 2; act of September 24, 1789, sec. 9, i Stat. at Large, p. 77.)

The consul at Cincinnati, as appears by the legal proceedings there, supposes that he is entitled to the benefits of certain peculiar stipulations in the consular convention between the United States

and France, of February 23, 1853. If it were so, that (385) would not serve him on the main point, because it does not exempt consuls from the criminal jurisdiction of either of the contracting governments. But this convention has no application whatever to the consular relations of Great Britain and the United States. Whether it applies or not to governments with which we have entered into stipulations to place our respective consuls on the footing of the most favored nation, is a question as yet unsettled. But there is no stipulation of that nature in existence, as between Great Britain and the United States. Of course, the duties and the rights of American consuls in Great Britain, and of British consuls in the United States, stand upon the law of nations, except as the same is modified by their treaties, and by the local law of either country. The local law of each, as we have seen, withholds from consuls the diplomatic privilege of exterritoriality. A British consul, therefore, has no just cause of complaint, if, when charged with an offence, he is held amenable to the criminal jurisdiction of the United States.

In addition to those ordinary means of redress in the case of the misconduct of a foreign consul, is that afforded by the law of nations. The President of the United States has the undoubted power, in his discretion, to withdraw the *exequatur* of any foreign consul. To justify the exercise of this power, he does not need the fact of a technical violation of a law judicially proved. He may exercise it for any reasonable cause, whenever, in his judgment, it is called for by the interests or the honor of the United States. (De Clerq, Guide des Consulates, p. 101.)

On each of these points provision was made in the commercial convention between the United States and Great Britain of July 3d, 1815, which stipulates that "before any consul (in either country) shall act as such, he shall, in the usual form, be approved and admitted by the government to which he is sent; and, * * in case of illegal or improper conduct towards the laws of the government of the country to which he is sent, such consul may either be punished according to law, if the law will reach the case, or be sent back; the (386) offended government assigning to the other the reasons for the same." (Art. iv.)

This convention, by its terms, was to subsist only four years. By a sunbsequent convention, that of October 20th, 1818, its duration was prorogued ten years, (art. iv;) and afterwards, by the convention of August 6th, 1827, for another ten years, and until denounced by either party on twelve months' notice.

For the rest, the stipulations of the convention of 1815, as con-

tinued by the conventions of 1818 and 1827, are but declaratory of the law of nations, as that is understood both in Great Britain and the United States.

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I have the honor to be, very respectfully,

C. CUSHING.

To the President.

Vol. VII, p. 395 (Cushing)

DEPOSIT OF SHIP'S PAPERS

Masters of American vessels are subject to prosecution in the name of the consul for omission to deposit with him the papers according to law, but not to indictment.

Attorney General's Office,
August 22, 1855.

Sir: I have received your communication of the 21st, enclosing a letter of Mr. Winthrop, the consul of the United States at Malta, and requesting me to give proper instruction on the subject to the attorney of the United States in New York.

It appears that two American shipmasters, Captain Borland, of the ship "Gauntlet," and Captain Stetson, of the ship "Alleganian," refused, on entering the port of Malta, to deposit their registers with the consul.

For so refusing, they are subject to a forfeiture of five hundred dollars, recoverable by the consul, in his own name, but for the benefit of the United States, in any court of competent jurisdiction. (Act of Feb. 23, 1803, s. 2; ii Stat. at Large, p. 203.)

Criminal procedure, under our laws, in such a case, applies only to the masters of foreign vessels in the ports of the United States. (Act of March 3, 1817; iii Stat. at Large, p. 362.)

I have addressed the attorney of the United States on the subject.

Meanwhile, I advise that Mr. Winthrop be instructed to report all such cases; and in regard to those now reported, as also any others of the same description, that, to prevent technical difficulties, he transmit express authority to the department to use his name in the suits communicating separate authority for each case. It may be well, moreover, to instruct the consul to see that proof exists in each case of the violation of the law.

I am, very respectfully,

C. CUSHING.

Wm. Hunter, Esq., Assistant Secretary of State.

Vol. VII, p. 542 (Cushing)

ASSETS OF AMERICANS ABROAD

The face of a banker's circular letter of credit, found in the possession of an American dying abroad, is not assets to that amount to be administered by the consul.

Attorney General's Office,
October 10th, 1855.

Sir: Your letter of the 24th ult., enclosing correspondence of the consul of the United States at Paris, and of Messrs. J. C. Howe and Co., of Boston, presents this question:

Mr. Alexander, a citizen of the United States, bearing a circular letter of credit from the Messrs. Howe, addressed to their correspondents in Europe, dies there. Is the amount, borne on the face of such letter of credit, assets of the deceased, on which the consul is to charge a commission for remittance to the United States?

Clearly not, in my opinion.

An American, leaving home to travel in Europe, or to buy merchandise there, deposits with a banker at home cash, or securities on his personal credit, on which to obtain a circular letter of credit on a banker, or, as often happens, a series of bankers, in Europe. The assets of the party remain here, they are not transferred there, except so far as he draws on the foreign banker. The authority to draw on the foreign banker is not itself assets, nor is the acceptance of that foreign banker assets. The whole transaction, when fixed by the presentation of the letter of credit and its acceptance, is only a promise of the banker to advance money on the credit of the drawer when called for by the drawer, to a certain limited amount. It is, in fact, a promise to lend to A. on the credit of B. Such a promise cannot, in any possible point of view, be *bona notabilia* of A.

(543) Any money which the holder of the circular letter of credit may have drawn out upon it, and then deposited with the foreign banker subject to check, will be legal assets of the deceased; but not so either the original face of the letter, or the balance upon it. The letter, instead of representing property of the deceased in the hands of the banker, or a debt of the banker to the deceased, is the very contrary of this, namely, a contingent debt of the deceased for the whole face of the letter, and an actual debt of his in so far as it has been cashed.

These conclusions are general, and cover the whole class of such letters,—whether limited in amount, or unlimited, as they may be, and sometimes are, and whether already drawn upon wholly, in part,

or not at all, and whatever may be their object or conditions. In no possible stage or form of the transaction are they *bona notabilia*.

Of course, in the particular case, that of the travelling letters of credit drawn by the Messrs. Howe, in favour of Mr. Alexander, dying in Paris, the letters are not subject to the charge of commission by the consul.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VII, p. 722 (**Cushing**)

DUTY OF SHIPMASTERS RESPECTING CRIMINAL SEAMEN

Shipmasters in foreign ports are subject, on the requisition of the consul, to take on board, and convey to the United States, distressed mariners; but not seamen or other persons accused of crimes, and to be transported to the United States for prosecution.

Attorney General's Office,

June 25, 1856.

Sir: The documents accompanying your letter of the 26th ultimo exhibit the following facts:

Seneca S. Bishop, a seaman of the American ship Corsica, committed a mutinous and felonious assault on board the same, and while she was on the high seas: an act punishable of course in the United States. (Act of April 30, 1790, i Stat. at Large, p. 113.)

The Corsica afterwards arrived at Calcutta; and while she lay there, Bishop was held in confinement by the local authorities at Calcutta. (See U. S. Consular Instructions, No. 134.) When the ship was about to depart, some question arose as to the disposition to be made of Bishop. The British authorities decided properly that the crime was to be deemed as committed in the territorial jurisdiction of the United States, and (723) as one of which the courts of the United States had cognizance, and therefore not within the cognizance of the courts of British India. The same authorities also perceived that the case could not be treated precisely on the footing of international extradition, for want of the forms of demand required by treaty and statute. At length, however, it was concluded to deliver the accused over to the custody of the American consul, by whom he was replaced on board the Corsica for conveyance to and trial in the United States.

But the master of the Corsica, who had in the first instance agreed to take charge of Bishop, and convey him to the United States for trial and punishment, afterwards repented of his undertaking,

and allowed the prisoner to escape before the ship had left the waters of India.

And the case is now represented to you by the consul, in order that due steps may be taken to punish the master for the alleged release of Bishop.

I doubt whether there is any provision of law which meets the act. Masters of American ships are compelled to bring home destitute seamen, but that provision cannot be construed in my opinion to embrace criminals under arrest. I am not aware of any law, which compulsorily imposes this duty on merchant ships of the United States.

That the two things are distinct, the conveyance of distressed seamen and the conveyance of criminals, is very apparent. It is obvious that the custody of a criminal requires special arrangements, for which the trifling compensation allowed in the case of distressed seamen is wholly inadequate.

Accordingly, in those consular codes in which completeness is aimed at, as in that of France, there is distinct provision for the two cases; and the consul, on requiring the transportation of a criminal on board a ship, has to enter into express contract with the master, with power to make advances to cover the cost, drawing therefor on his government. (De Clercq et Vallat, Guide des Consulats, p. 368; De Clercq, Formulaire des Chancelleries, tom. ii, p. 70.)

I cannot advise, therefore, that anything further be done in the premises, in so far as regards the master of the Corsica. I (724) beg leave to suggest, however, that the conduct of the American consul in the affair, and that of the British authorities at Calcutta, are, it seems to me, entitled to the particular commendation of the president.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

Vol. VIII, p. 73 (Cushing)

AMERICAN SHIPS IN FOREIGN PORTS

Ships of war enjoy the full rights of exterritoriality in foreign ports and territorial waters.

Merchant ships are a part of the territory of their country, and are so treated on the high seas, and partially, but not wholly so, while in the territorial waters of a foreign country.

Crimes committed on board ship on the high seas are triable in the country to which she belongs.

In port, the local authority has jurisdiction of acts committed on board of a

foreign merchant ship while in port, provided those acts affect the peace of the port, but not otherwise; and its jurisdiction does not extend to acts internal to the ship or transpiring on the high seas.

The authority of the ship's country, in these cases, is not taken away by the fact that the actors are foreigners, provided they be of the crew or passengers of the ship.

The local authority has right to enter on board a foreign merchantman in port for the purpose of inquiry universally,—but for the purpose of arrest, only in matters within its ascertained jurisdiction.

Attorney General's Office,
September 6, 1856.

Sir: I have examined the correspondence between Mr. Mason, the envoy of the United States, in France, and the president of the council of state of the French empire, charged *par interim* with the ministry of foreign affairs, M. Baroche, as communicated to me by your note of the 5th instant, and have reflected on the pertinent questions of public law which you suggest for my consideration.

Without entering into recapitulation of all the facts involved in the discussion, it will suffice for the present purpose to state such only as are essential to the right understanding of the points now remaining to be determined.

It appears that, while the American merchant-ship Atalanta was on a voyage from Marseilles to New York, and on the high seas, out of the municipal jurisdiction of any government, acts of insubordination and violence occurred on the part of her crew, by whom the ship was forced to put back to Marseilles.

On her arrival in port, the criminal parties were, on the application of the American consul, received and imprisoned on shore by the local authorities.

(74) Afterwards a certain number of them were released absolutely with assent of the consul. Thirteen of the crew thus remained. Of these, a portion, six in number, were, on the application of the consul, taken from the prison and placed on board the Atalanta for conveyance to the United States, under charge of crime. Then, with notice to the consul, it is true, but in spite of his remonstrances, the local authorities went on board the Atalanta, and forcibly resumed the possession of the six prisoners, and replaced them in confinement on shore, where they now remain, together with the seven others not taken on board, the subject of the pending correspondence.

It does not distinctly appear of what nationality these men are; but it is implied by the tenor of the discussion on both sides that they are neither citizens of the United States nor citizens of France.

The acts of criminality with which they stand charged constitute the crime of revolt, and also that of felonious assault, under

circumstances which bring the case within the jurisdiction of the judicial authorities of the United States. (Act of March 3, 1835.)

To the same effect, undoubtedly, is the French law, which assumes, as ours does, that the ship is a part of the territory of her country, and provides specially for the punishment of crimes committed on board. (Ord. de 1681, liv. 11, tit. 1, art. 22; Valin, Comment., tom. 1, p. 449; Decret du 24 Mars, 1852, De Clercq, Formul. tom. ii, p. 348.)

To this, it is wholly immaterial by our law whether they were citizens of the United States or not. (United States v. Sharp, i Peters C. C. R. p. 118, 121.)

Nor is it material whether, in their shipment on board the Atalanta, the master did or not infringe the navigation laws of the United States.

The practical inquiries are—

1. Whether, in view of the stipulations of the consular convention between the United States and France of February 23, 1853, or of the rules of international law, the French authorities acted rightfully in going on board the Atalanta to retake (75) the six seamen placed there for transmission to the United States.

2. Whether the American government may now, in virtue of treaty or of the law of nations, rightfully demand the extradition of these thirteen men, for transmission to the United States, there to be tried in due course of law for their imputed crimes?

It is due to the Emperor's government to say that the questions made in the case are manifestly presented by it in good will and in all comity as regards the United States; and may, therefore, be dealt with by me unreservedly in their mere legal relations.

1. Of the rightfulness of the retaking of the men from on board the Atalanta.

I perfectly agree with M. Baroche, that it was not the object of the consular convention, to confer on the consuls of either nation the *jurisdiction* of crimes in the ports of the other.

It is also undeniably true that, by the general rules of public laws, at least as they are understood and received in the United States, we do not claim for ourselves, nor concede to other nations, the right of exterritoriality for merchant-ships in the territorial waters.

If, in concluding this convention, the two governments had designed to establish as between themselves a new rule in this respect, they would have said so expressly; and if they had so declared expressly, the convention would not have been confirmed on our side, for no state of the Union, probably, would have consented thus to

surrender its own municipal jurisdiction in its own waters to the consuls of France.

But, in treating the question as one either of the criminal jurisdiction of consuls or of the exterritoriality of merchant-vessels on the territorial waters, do we not assume for it too broad a scope?

I conceive the true question to be a much narrower one. It is, whether, when a crime has been committed on the high seas, on board an American ship, that crime being of the sole competency of the United States, and the ship is compelled by her contract of destination, by stress of weather, or by the crime (76) itself, to touch at a French port,—whether, in such case, the criminal may be forcibly withdrawn from the ship by the local authorities or by the order of the government.

This question presents itself here in three different forms:

First, the French authorities take the temporary custody of the parties at the request of the American consul.

Secondly, the French authorities redeliver a portion of the prisoners to the consul to be held on board the Atalanta; and,

Thirdly, they retake the latter prisoners from on board the Atalanta.

In my opinion, when the Atalanta arrived at Marseilles, the master of that ship had lawful power, with aid of the consul if required, to retain these men on board. Though not citizens of the United States, they were American seamen, under voluntary contract for a voyage to New York, whom the local authorities had no just power to discharge from their contract. The consideration that they had committed crimes on board the ship, but not within the local jurisdiction, for which crimes they were liable to be punished on her reaching New York, did not give to the local authorities any just right to interfere. If crime had been committed while the ship lay in the territorial waters, then the local authorities, and they alone, would have had jurisdiction, and might have gone on board to seize the prisoners by force. But not when no act had been done by them to give jurisdiction of the case to France.

I transfer the question to the United States, and proceed to suppose that a French merchant-ship, on her way to Marseilles, puts into New York, in distress, having at the time mutinous members of her crew confined on board. Could such persons, in such a case, be lawfully taken away from the custody of the master by the local authorities, with instrumentality of the writ of *habeas corpus* or otherwise? I think not.

Now, by the consular convention, and by the law of nations without it, the consul represented the master, and his country alone, in

matters calling for the intervention of the authorities of Marseilles. This representative duty, and this only, the consul undertook to discharge in the present case. He did not (77) claim or assume to exercise any power judicial or other, in derogation of the territorial sovereignty.

I think the consul acted lawfully, when, at the first stage of the transaction, he requested the local authorities to take temporary charge of these prisoners.

I do not say the local authorities were bound to assume the responsibility of such custody; but they might well in comity do it; nay, it was their duty, in my opinion, at the call of the consul, at least to lend him their aid in this respect, by the express terms of the convention.

I concede, in the fullest terms, the integrity of the local sovereignty; and that, instead of contradicting, seems to corroborate my view of the subject; for how shall the consuls maintain the internal order of the merchant-vessels of their nation,—how, in the foreign port, shall they imprison persons,—save through the assistance of the local authority? Are they to do it by their own unaided force in the presence of the local jurisdiction?

Surely, to allow this, would be to introduce the greatest disorders, which can be avoided only by having recurrence to the local authority for its own lawful action in behalf of the consul.

However this may be, my conviction is clear that the local authority, even if it may refuse to aid, cannot lawfully interpose to defeat, the lawful confinement of any members of the crew by the master, on board the ship, with advise and approbation of the consul.

If the parties confined have the lawful right to be discharged from such custody, they may obtain it on application to the consul. That is one of his legitimate, exclusive, and ordinary functions.

That the right and the power of the local jurisdiction are such only as here suggested, is the opinion of the jurists of France.

Ortolan states the doctrine, as follows:

"As to ships of commerce, we know that when they are in the territorial waters of a foreign state, they are not exempt from the local police and jurisdiction, *except as to facts happening on board which do not concern the tranquility of the port, or persons foreign to the crew.* For all other facts they remain (78) subject to this police and this jurisdiction. Hence, it follows that the local authority has the right to pass on board these vessels, there to pursue, search for, and arrest persons who have been guilty, either on shore, or even on board, of *acts amenable to the territorial justice.*" (Diplomatie de la Mer, tom. i, p. 335.)

In the present case, the crimes committed on board the Atalanta, were not "amenable to the territorial justice;" they did not concern "the tranquility of the port," nor did they affect any "persons foreign to the crew."

The rule of law, as thus laid down by Ortolan, seems to have been drawn from a decision of the council of state in the time of the Emperor Napoleon I., to the point that the local authority will not intermeddle with acts, even crimes, committed on board a foreign ship in such circumstances. (Ortolan, tom. i p. 450, annexe, ii.)

Nay, the French laws do not hesitate to prescribe that when crimes are committed on board a French vessel in a foreign port, *by one of the crew against another of the same crew,* the French consul is to resist the application of the local authority to the case. (Ord. du 29 Oct. 1833, tit. iii, art. 22,—De. Clercqq, Form. tom. ii, p. 65.)

This doctrine has become so firmly fixed in France, that the text writers assume it as a rule of international law. (See M. M. de Clercqq et de Vallet, Guide Pratique, tom. i, p. 366.)

Indeed, the recent legislation of France confers on her consuls unmistakable *jurisdiction* in these matters. (Decret du 14 Mars. 1852; see De Clercqq, Formulaire, tom. ii, p. 348.)

Previously, their duties were in the nature of *surveillance,* rather than jurisdiction. (Moreuil, Guide des Agens Cons. p. 389.)

We de not go so far in this as France. I admit, as already stated, the local authority in regard to crimes committed on board a merchantman in the territorial waters. But I deny that the local authority has any right to interfere with persons lawfully detained on board the ship by the laws of the country to which she belongs, as for a crime committed on the high seas among members of the crew, and not justiciable by the foreign jurisdiction. France, at least, cannot deny to us, it (79) would seem, this exemption, when she herself claims to extend it so much further, and make it comprehend occurrences internal to the crew, even though happening in port.

The doctrine of the public law of Europe on this point is well stated by Riquelme, as follows:

"Crimes committed on the high seas, whether on board ships of war or merchantmen, are considered as committed in the territory of the state to which the ship belongs, because only the laws of the latter are infringed, and consequently only the jurisdiction of the same is called upon to adjudicate, whether the accused be of the nationality of the ship or a foreigner, and whether the crime were committed against a fellow-countryman or between foreign passengers.

"If the ship, on board of which the crime has been committed, arrives then at a port, the jurisdictional right of the territory, to

which the ship belongs over the accused, does not on that account cease. So that, if one of these were a foreigner, subject to the state to which the port, at which the ship stops, belongs, even in that case it is the right of the captain to detain him on board, that he may be judged by the tribunals of the ship's country. And if this passenger should get on shore, and should institute before the tribunals of his country proceedings against the captain, the local authority will be incompetent to judge the foreign captain, because the fact in question occurred in a foreign country, that is, on board a foreign merchantman on the high sea, and because, by embarking in that ship, the party is presumed to have submitted himself to the laws of the foreign territory of which the ship constitutes a part.

"When the crime is not committed on the high seas, but while the ship is in territorial waters, then it is necessary to distinguish between ships of war and merchantmen. In the first case, the principle of exterritoriality covers the ship from all foreign intervention or investigation. * *

"In the second case, when the crime has been committed on board a merchantman in a foreign port, the resolution is different, because the condition of a merchantman in a foreign port is different from that of a man-of-war. The rule in these cases, in default of treaties or inducements of reciprocity (80) determining it, is, that if the offence affect only the interior discipline of the ship, without disturbing nor compromitting the tranquillity of the port, the local authority ought to declare itself incompetent unless its assistance is requested, because the true regulator of these questions, in which the local authority has no interest, is the consul.

"But, if the offence has been committed by one of the crew against a subject of the country or another foreigner, or if, occurring among those of the crew, it be of a nature to compromise the tranquillity of the port, then the territorial jurisdiction is entitled to punish the crime even although the accused undertake to claim the protection of the ship." (Riquelme, Derecho Internacional, tom. i, p. 243, 245.)

These are just and reasonable views, applicable to the present case.

I confess myself wholly at a loss, therefore, to see on what assignable ground of strict international right it was that the local authority at Marseilles proceeded in withdrawing these parties from their lawful confinement on board the Atalanta.

If, indeed, it were the intention of France to try these men for their crime, and it had been committed in the territorial waters, so as to be capable of being tried there, then, indeed, we might see

cause for withdrawing them from the custody of the ship or the consul. But no such thing is proposed in the despatch of M. Baroche.

If the legality of what has been done be admitted, then municipal crimes perpetrated on the high seas will much of the time escape unpunished. One term of every voyage is a foreign port. If a crime, other than piracy, be committed while on the way thither, and the criminal cannot be detained on board the ship or on shore subject to the discretion of the consul, he cannot be tried; for the local authority cannot try him, and if he is to be withdrawn from the custody of the ship, he cannot be tried in the country to which she belongs, and which alone has jurisdiction.

Thus the effect of the course entered upon by the local authority at Marseilles, if it should be sanctioned by the Emperor's government, and admitted by the United States, would (81) be to discharge these criminals without punishment, to set the example of immunity of crime in all such cases for the future, and tend to the most calamitous consequences, as respects the safety of the commercial marine of both France and the United States.

The public evil in this respect would be sufficiently serious, when considered in the relation to the case of ordinary voyages, but in other cases, such as that of vessels forced into port by stress of weather, or other common perils of the sea, it would grow to be intolerable, and more especially as in the case of acts of insubordination on the part of the crew. Meanwhile, seamen would have nothing to do but to seize the ship and make for a foreign port, there to be released by the local authority. It would be to hold out inducements and temptation to mutiny and murder on the high seas.

The superior intelligence of M. Baroche cannot fail to see this, and to impel him to suggest to the diplomatic agents of any other government, who have made representations on the subject that, in seeking, for whatever plausible reason, to abstract these men from the only jurisdiction which can try the offence, they do irreparable prejudice to the interests of all the maritime states of Europe and America.

It cannot be for the interest of Sardinia, for instance, of Austria, of Spain, to have it established as a rule of public law, that seamen who have committed crimes appertaining to their penal jurisdiction and to no other, shall be set free the moment the ship in which they may be, touches at a foreign port. It is for the common benefit of the civilized world to see to the condign punishment of all crimes committed on the high seas.

Permit me to add that the United States, while recognizing the local authority generally in the case of merchant ships, have never

claimed nor conceded it as to things not appertaining to the territorial jurisdiction. We have constantly affirmed our right to detain on board our ships, even in a foreign port, persons held to such detention by the laws of the United States. (See Mr. Legaré's opinion of July 20, 1842. Also Wheaton's Elements by Lawrence, p. 156 note.)

Permit me also to remind you of the recent case of the ship (82) Corsica at Calcutta, (Opinion June 25, 1856,) which greatly resembles this in many respects, involving the question of extradition, as well as detention, and which was disposed of by the British government, on both points, as claimed by us here, that is, as a matter appertaining to the jurisdiction of the United States.

I have discussed this part of the subject, as you will have perceived, in points of view, which are independent of any seriously debatable matter in the construction of the consular convention. Before leaving it, allow me to say a few words on that question.

The relevant stipulations of the convention are contained in the 8th article, as follows:

"The respective consuls general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant-vessels of their nations, and shall alone take cognizance of differences which may arise, either at sea, or in port, between the captain, officers, and crew without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship, or the list of the crew, and shall be held during the whole time of their stay in the port, at the disposal of the consuls. * * Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

I conceive that, regarding this article as we should, that is, as a part of our public law, adapted to, and cohering with, other parts of our public law, all the difficulties in its construction vanish.

The national sovereignty of the United States, like that of France, is complete within its own territory. Neither nation confers exterritoriality on foreign merchant ships within its (83) waters. Neither nation asserts for its consuls judicial authority for the trial of crimes except in countries without the pale of Christendom. But each nation

does, by the general rule of public law, and more especially by this convention, as between France and the United States, concede to the consuls of the other a certain authority of discipline, and to the ships of the other a certain privilege in its ports.

As to the questions of mere *civil* right, internal to the ship and to her crew, even if the latter be on shore, we agree that the consuls are to have cognizance, and are to be aided by the local authorities in this respect.

But now as to *criminal* matters? These, it is clear, cannot be *tried and judged* by the American consul in Marseilles, nor by the French consul in New York.

Is the consul, for this reason, stripped of all power, and the ship herself of all immunity, in respect of persons subject to detention for any cause, either civil or criminal? I think not. I think when the convention says that the respective consuls "shall have exclusive charge of *the internal order* of the merchant vessels of their nation," the word "internal" imparts perfect precision to the proposition.

What is "internal" in this context? Plainly, it seems to me, everything which does not appertain, either by the law of nations or the municipal law, to the local jurisdiction. If the acts of *disorder,* if the "differences" be matters of local jurisdiction, then, as *questions,* they are, jurisdiction external to the ship.

Apply the test to this or any other case of the same principle, and it reconciles all controversy. Where there is in what occurs on board the ship no infringement of the laws of France or of the United States, then the local authority has no concern in the matter, save in the terms of the article to support the consul in maintaining the authority and executing the laws of his own government.

I do not mean to say that the local authority may not, in either case, inquire into the legality of any alleged act of detention on board the foreign ship; but on ascertaining such legality, there the local authority is bound to stop. And surely no detention could be more thoroughly lawful than that of a (84) mutineer on his way to the place of examination and judgment.

2. As to the extradition of the thirteen men still held in prison at Marseilles.

I doubt whether it is properly a question of extradition.

It is manifest that these men are not fugitives from the justice of the United States seeking refuge in France.

In truth, these men have either been wrongfully taken from our national custody by inadvertance of the local authority, which ought, in the mere correction of error, to return them to our custody; or else they are to be regarded as prisoners held by the local authority *pro*

tanto acting for us under the consular convention, and bound to retransfer them on demand to the direction of the consul in order to be replaced on board the Atalanta.

But, if it be a case of extradition, then they are subject to it by the terms of the convention of November 9, 1843. That convention, it is true, does not provide for the crime of revolt or mutiny on board ship: but it provides for that of "attempt to commit murder," (tentative de meurtre.) That crime was committed in this case, it was committed within the putative territory of the Union, it is justiciable by the federal courts and by them alone; and you may, in my judgment, rightfully demand their extradition for this cause.

At the same time the convention speaks of "persons who shall be found within the territories of the other," and therefore the case comes within the letter of the convention.

It has been held in some parts of the United States, that a misdemeanor is merged in a felony, and that a party guilty of the higher cannot be charged with the lower offence.

But that doctrine is losing ground. And it has never been held that, where an act involves two distinct felonies, the party may not be charged on either, at the election of the prosecuting officers of the government.

I concur with Mr. Mason in opinion that the local authority of Marseilles exceeded its lawful power in the present case, in substance as well as in form.

(85) The latter fact is implied by the new order of the minister of marine of June 24, 1856, regarding the visitation of foreign merchant ships, in the ports of France.

This order, supplemental to those of July 26, 1832, and January 24, 1855, admits that theretofore the visitation should be made with concurrence of the consul.

It is material to observe, however, that the subject-matter of such visitation, on the face of all these orders, is perquisition into acts in violation of the laws of France. No such acts are pretended in the present case.

At the same time, I do entire justice to the motives of the Emperor's government in this transaction. They are frankly stated by M. Baroche.

The guilty parties are subjects of other nations, which, like us, are in amity with France, who seeks only to discharge her public duty to each with perfect impartiality. It is objections of theirs, rather than his own, which M. Baroche brings to the notice of Mr. Mason. Allow me to submit two or three legal suggestions applicable to this point.

I do not conceive that another nation, Sardinia for instance, can,

simply because these men are her subjects, interpose in the question for any purpose except to see that they be lawfully tried. If a subject of Sardinia, having committed a crime in the United States, flee to France, can Sardinia justly object to his extradition? Surely not.

If indeed the Sardinian be a fugitive from the justice of Sardinia, having committed a previous crime there, and his extradition be demanded simultaneously by Sardinia and by the United States, then, indeed, France might be embarrassed by the conflicting appeals to her treaty engagements, and her loyalty.

But this embarrassment only applies to the case regarded as a question of extradition. Taking the other, and as it seems to me the truer view of the subject, there is no conflict of duties on the side of France; for the guilty parties have been from the beginning, and are still, in the constructive if not in the actual custody of the United States. That consideration furnishes a (86) complete answer to the reclamations of any other government.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. William L. Marcy, Secretary of State.

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(98) ESTATES OF FOREIGN DECEDENTS

The estates of foreigners dying in the United States are settled by the local authorities.

Administration may be granted to the next of kin if he reside in the state.

The consul of the decedent's country can intervene of right only by way of surveillance, and without jurisdiction.

Attorney General's Office,
September 12, 1856.

Sir: I have the honor to respond herewith to the inquiries of the envoy of the Emperor of Brazil, Mr. Cavalcante d'Albuquerque, regarding the settlement of the estates of persons, subjects of other governments, who may die in the United States, leaving property here.

It is necessary to remark, in the first place, that, with exceptions not material to be mentioned here, because of their little concern to the interests of foreigners—with such immaterial exceptions, the regulation of successions in the United States, whether testate or intestate, belongs to the local jurisdiction of the individual state.

In the second place, if the property of the decedent be real es-

tate, the immovable property of the civil law,—then, its dis-(99) position depends altogether on the laws of the place. Unless there be treaty stipulations to the contrary, or the succession consists of personal estate exclusively, the local authorities are alone competent to determine questions of inheritance and succession.

As to movables, personal effects,—then, also, unless the contrary be stipulated by treaty, the *administration* of the estate of a foreign decedent is primarily a question of the local jurisdiction, and his consul can intervene only so far as the local law may permit, though the *distribution* of the estate will not of necessity be governed by the local law.

The course of proceeding, with relation to the rights of third parties heirs or creditors, may be illustrated by example of the laws of the state of New York.

If any person die intestate in the state of New York, leaving effects to be administered, the administration will be granted to the widow or next of kin, or in their default, to a creditor; provided that the administrator must be a person *sui juris* in law, and either a citizen of the United States, or, if not, then a resident of the state. If no person so entitled appear to administer, then administration will go to some appropriate public officer of the state. If the next of kin be a minor, his guardian may be appointed administrator in his stead.

If the party die testate, leaving effects in the state, letters testamentary may be granted to the testamentary executor, if he be competent to act, that is, if he be *sui juris,* and unless he be an alien not resident in the state.

In either contingency, the distribution of the property in case of intentacy, and its testamentary destination in case of testacy, will be governed by the law of the decedent's proper domicil, with some exceptions, perhaps, where the competing claims of domestic and foreign creditors affect the property.

Such is, in substance, the legislation of the state of New York in these respects. There is difference of detail in some of the states; but their legislation is all referable to the same general principles of jurisprudence.

In all these cases, the consul of the decedent's country has (100) no jurisdiction: he may intervene by way of advice, or in the sense of *surveillance,* but not otherwise *as consul,* and of right.

Thus, if the decedent, being a foreigner, leave in the state a minor heir, the consul of his country may intervene to see that he have a proper guardian to secure his interests in the succession. Or, if the decedent leave a will intended to operate in his own country, it is the right of the consul, and his duty, if the circumstances require it,

that is, in the absence of adult heirs on the spot, to see to the safe-keeping of the will, and its transmission to the parties entitled.

Sundry legislative acts of the United States, proceed on the assumption that American consuls, in foreign countries, will collect and remit the assets of deceased Americans. Their authority to do this will depend, of course, on the law of the foreign country:—if permitted by that law, and so far as permitted, the consul may do it, but not otherwise, nor further, unless allowed by treaty. And so it is with respect to foreign consuls in the states of the Union.

It seems very clear that if any contentious question arises,—as if there be debts due the estate of the decedent, or conflicting claims upon it,—there can be no settlement of the estate by the consul; it can be administered only by due appointment of the local authority.

But if there be no litigious matter involved, a traveller or other transient person dying with personal effects in hand, the consul may well take possession of the same for transmission to the decedent's country.

The true relations of the question are sufficiently illustrated by the tenor of an old article of treaty between England and Spain, repeated by the treaty of Utrecht; according to which it is stipulated that the respective foreign consuls may inventory the effects of a deceased countryman, and remit them, without intervention of any local tribunal. (See Miltitz, Des Consulats à l'Etranger, partie ii, p. 408, 414, 425.)

The difficulty of complying with this stipulation, in Spain, soon became apparent, in consequence of which we have the law of November 20, 1724, providing that the local authority shall make duplicate inventory, and shall hear and adjudge (101) all contested matters. (Novisima Recopilacion, lib. vi, tit. 13, l. 4.)

The same difficulty must of course have existed in England.

Consuls, in one country, or the other, raised the question from time to time, until in the years 1839 and 1840, by undergoing almost simultaneous discussion in Madrid and in London, through the claim of a British consul in Spain, to exercise complete jurisdiction in the matter, which the Spanish government refused,—and the claim of a Spanish consul in England, which the British government refused,—it was at length settled, to the effect, that, notwithstanding the treaty, the consular right on both sides must be limited to the inventory of the effects found in the dwelling of the deceased, subject always to the intervention of the local authorities in case of any contested right on the part of third persons. (Riquelme, Derecho Internacional, tom. i, p. 422.)

A decisive case to the same point, which recently occurred in

the island of Mauritius between the French consul and the local authorities, is reported by Moreuil. (Agents Consulaires, p. 515.)

And the general rule, undoubtedly, in all the countries of Christendom, is, that the local authority has power to take the inventory if it will, the functions of the consul being then bounded to the right of assisting in behalf of the legal representatives of the deceased. (Santos, Traité du Consulat, tom. i, p. 21; tom. ii, note 52.)

Such, and such only, except where special stipulations of treaty intervene to change the rule, is the admitted authority of foreign consuls, as to the questions of succession, in the several states of the Union, as well as in Europe. (De Clerq et De Vallat, Guide des Consulats, p. 686.)

In the federal courts of admiralty, when adjudicating cases of prize, or other questions of maritime and international right, foreign consuls are admitted to appear in behalf of the interests of their countrymen, absent or present; but even there, what they do is in the nature of *surveillance* rather than jurisdiction; for they are not deemed competent to receive the proceeds of (102) property libelled, in the absence of specific powers emanating from competent authority.

In so far as the consul has power to act in these matters at all, he may act by procuration.

As to the extent of the country, to which the consul's faculty of *surveillance* reaches in matters of succession, that of course depends primarily on the instructions of his government and the tenor of his *exequatur;* but any difficulty arising in this respect could be removed by the direct interposition of the minister of that government accredited to the United States.

I believe these observations cover all the points of inquiry suggested by Mr. Cavalcante d'Albuquerque.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

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CITIZENS—FOREIGN CONSULS

Citizens of the United States, who hold foreign consulates in the United States, are not exempt from jury duty or service in the militia by the law of nations, or by the constitution and laws of the United States, nor unless exempted by the statutes of the state of the Union in which they may respectively reside.

Attorney General's Office,
November 3, 1856.

Sir: Inquiry has been addressed to me by several persons, citi-

zens of the United States discharging consular functions here by appointment of foreign governments, on the point, whether consuls so situated are subject to be called on to serve in the militia or as jurors. While it seems a little ungracious to refuse to make reply to these gentlemen, it would, on the other hand, be inconvenient to answer them officially, unless with your concurrence. I propose, therefore, in this communication, briefly to state my impressions on the subject, in the view of transmitting a copy to the parties in question, provided you do not see objections to that course.

No well-established universality of international rule exists on the subject of the immunities of consuls accredited between the states of Christendom. Of course, there is diversity of practical administration on this point, according to the tenor of treaties, the customary law, the legislative enactments, and the executive regulations of each particular country. And the incompleteness of provision, and uncertainty of doctrine, are especially notable in Great Britain and in the United States.

The stipulations of two recent treaties, that with France of February 23, 1853, and that with the Netherlands, of January 22, 1855, afford apt and sufficient illustration of the state of (170) this question at the present time; especially the former, which is likely to constitute a new point of departure in the consular relations of the United States and of other powers of Europe and America.

That convention stipulates, in the first place, that consuls, of either France or the United States, in the country of the other, shall enjoy "personal immunity, except in the case of crime, exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature, and from all direct and personal taxation, whether federal, state, or municipal." (Art. ii.) Consuls of the two countries are thus placed respectively on the footing of the most enlarged and liberal view of consular functions and rights. (De Clercq et De Vallat, Guide Pratique, liv. i, ch. 1, no. 4.)

If, however, the convention proceeds in substance to say, the consul is a citizen of the country in which he resides and officiates, or if he becomes the owner of property there, or engages in commerce, then, save in things appertaining to his consular functions, he is subject to the same local duties and obligations as other citizens of the country, or denizens, who are proprietors or merchants. (Art. ii.) This, also, is conformable to the spirit of international jurisprudence.

Comparing the two members of the stipulations cited, we perceive that foreign consuls, subjects of the government they represent, and not engaged in commerce, and they only, are altogether exempted from service in the militia and municipal charges.

They are exempt from taxation, also, unless they have taxable property in the country.

If they have property in the country, or if they be engaged in commerce, they are liable to taxation, even if they be subjects of the foreign government; and *a fortiori* if they be citizens of the country in which they reside.

If the foreign consul, being a subject of the government he represents or of some other foreign government, engage in commerce, he then stands on the footing of other *denizens*. He will not be competent to serve on juries; nor will he be subject (171) to enrollment in the militia. His condition in this respect is not a privilege as consul, but a disability as alien.

As to the particular question now before me, some writers have assumed, without due authority, that a citizen of the country, bearing the consulate of a foreign country, is exempted by the law of nations from service in the civic guards or the militia. Such is the assertion of Phillimore, (International Law, vol. ii, p. 246,) repeated by Horne, (Diplomacy, p. 93.) In support of the doctrine, they cite Ch. de Martens. But this author goes further, and affirms that such a person ceases for the time being to be a citizen or subject of his country. (Guide Diplomatique, pte Ire, ch, 10, s. 79.) On these premises, and not as a necessary consequence of consular functions, the exemption from municipal charges might be sustained. But the fallacy of the premises themselves has been fully exposed by Pinheiro Ferreira. (Ibid. observ. ed. 1837, tom. i, p. 214.) Indeed, the material point has been adjudicated by the courts, in the discussion of the important question of the national character in time of war. (The Indian Chief, iii Rob. p. 27; The Falcon, vi Rob. p. 197; The Josephine, iv Rob. p. 26; Arnold v. The United Insurance Co., i Johns. Cases, p. 362.)

And the necessary subjection of a citizen of the country to its municipal laws, although he be a foreign consul, constitutes, in the opinion of writers of authority, one of the facts to be taken into account by the appointing government. (Borel, Des Consuls, ch. 4; Vattel, Droit des Gens, liv. ii, ch. 2, s. 34; De Cussy, Réglements Consulaires, ch. 6, 7; Wildman, International Law, vol. i, p. 135.)

Persons thus situated are exempt from municipal charges by the legislation of some countries, as in Denmark, for example, (Santos, Traité du Consulat, tom. ii, p. 655,) and in France, (Moreuil, Dictionnaire des Chancelleries, tom. i, p. 353.) But, in general, distinction is maintained between such consuls, and those who are subjects of the country they represent, and especially consuls of the latter class not engaged in commerce. (De Clercq et De Vallat, *ubi*

supra. See, also, Mensch, Manual, p. 16; De Cussy, Réglements Consulaires, p. 77.)

In the absence of any fixed rule of the law of nations on (172) this point, it must be referred, of course, in each country, to its own particular laws for determination.

A citizen of the United States, taking upon himself the consular functions in his country for a foreign government, does not cease to be a citizen of the United States.

Thus, the consul general of the Argentine Confederation in New York, or of Chile in Washington, if he be otherwise a citizen of the United States, still remains one. Neither would be ready to admit that he thus becomes an alien, so as to be incompetent to hold land, to own ships, to exercise other privileges and rights of an American.

According to a provision of the constitution, it is true, he becomes disqualified to hold, at the same time, an office under the Federal government, without consent of congress. (Art. i, s. 9. See opinions, vol. vi, p. 409.) But the constitution does not subject him to any other disqualification.

On the other hand, the constitution accords to every foreign consul the privilege to be sued only in the federal courts. (Art. iii, s. 2.)

I do not know that the question, whether the privilege comprehends such foreign consuls as are citizens of the United States, has ever been deliberately considered and decided by the supreme court. There is one case reported, of which the federal courts took jurisdiction because the party was a consul, though a citizen of the United States; but it does not appear, by the report, that this fact was indicated to be considered by the supreme court. (Davis v. Packhard, vii, Peters, p. 276.) The privilege, in such case, has been recognized by the courts of the state of New York. (Valarino v. Thompson, iii Selden, p. 577.) The point can hardly be considered as a settled one until it shall have been passed upon directly by the supreme court of the United States.

But here, at any rate, it would seem, constitutional privileges, as well as disabilities, stop.

Such a person is not exempted from service in the militia, either by the constitution, or by the act of congress providing for military enrolments. (See act of May 8, 1792, i Stat. at Large, p. 272.) Nor is there in the constitution, or in the acts (173) of congress, anything to exempt such persons from service on juries. (See act of September 24, 1789, i Stat. at Large, p. 88; act of May 13, 1800, ii Stat. at Large, p. 82; act of July 20, 1840, v. Stat. at Large, p. 394.)

In all these acts, it is true, there is reserve of the right of the states to add to the classes of exemption from service in the militia;

and the designation of jurors for service in the federal courts is to be made in conformity with laws in force in the respective states. Thus it happens that any state may, if it see fit, declare a citizen, who is at the same time the consul of some foreign government, disqualified for, or exempt from, services in the militia, or as a juror, just as it may pronounce him disqualified for, or exempt from, the exercise of the elective franchise, or the discharge of any office or duty, political or municipal, under the authority of the states.

I cannot undertake to say that in some one or more of the states, it may not have been enacted that citizens acting as foreign consuls shall be relieved from militia duty, jury duty, and other municipal duties; but, in the absence of any such local legislation, they are not so exempted by the constitution, the law of nations, or acts of congress.

If question be suggested of the power of the several states in this respect, the answer is that where a point of international right, public or private, is definitely settled by the law of nations, it may, perhaps, be looked upon as withdrawn from the domain of municipal authority; but not otherwise. And if a matter be thus left to the domain of municipal authority, then the inquiry, in the United States, as to whether it is to be regulated by federal law or by the law of particular states, depends on the provisions of the constitution of the United States.

Thus, exemption from personal taxes, and from other descriptions of municipal charge, is the undoubted right of foreign ministers by the law of nations, and cannot be invaded by the legislation of any one of the states.

But the present matter not being definitely determined by the law of nations, it remains subject to the diplomatic or legislative power of the United States in the first instance, and, (174) in default of any action on their part, to the legislative power of the respective states.

Whether it be expedient or not to bestow these exemptions on citizen-consuls, is a matter not essential to the solution of the questions of law presented to me for consideration. At the same time, two or three suggestions may not be out of place.

Beyond all doubt, it is advantageous to the United States, in its relations with a foreign state, to have consular functions bestowed by the latter on their citizens. It is an additional tie of interest and channel of amicable intercourse. On the other hand, it is advantageous to the foreign state, especially to those of the second order, which cannot conveniently bear the expense of paid consulates in all the foreign ports or other places where consular services may be

needed. Besides which, the consul, when he is a citizen or subject of the country where he resides, can, by means of local knowledge or influence, promote the interests of the employing government more effectually than one of its own subjects could do, in all the ordinary relations of commerce at least, if not in political matters. The United States have themselves experienced this in the case of some of their own consuls, subjects of the country in which they reside, who have been useful to us, in circumstances where nothing could have been accomplished by an American.

But the counter inconveniences, of according to persons of this class exemption from local charges or duties, are very great. Concede semi-diplomatic functions to consuls, who are subjects of the government employing them, and who are not engaged in commerce. That is well. But the concession of the same rights to consuls in commerce, and subjects of the country where they reside, would involve an extension of individual exemption and privileges, unjust to other citizens, and prejudicial to the public interests. The employment of paid consuls, forbidden to engage in commerce, will regulate itself by reason of its financial relations. But there will be no check of this nature to the employment of consuls and vice-consuls, citizens of the country, with local concerns of commerce or property. And the indefinite multiplications *of persons* so situated, if, in addition to a privileged forum, they are permitted to enjoy (175) exemption from taxes and local charges or duties, is contrary to the policy as well as the interest, not only of the individual states, but also of the United States. (Viveash v. Beeker, iii M. and S. 284.)

I have the honor to be, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

RELATION OF CONSULS TO CRIMINALS

Consuls of the United States, in foreign countries, are required to see to persons charged with the commission of crimes at sea or in port, under circumstances giving jurisdiction to the courts of the United States, and have authority to send such persons home for trial, and in that view, to inquire into the facts of the alleged crime.

But the authority of the consul, in such case, is ministerial not judicial in its nature.

Attorney General's Office,
February 11, 1857.

Sir: Your communication of the 30th of December, enclosing

a letter from Mr. Blythe, consul of the United States in (381) Havana, submits question as to the amount of evidence on which a consul in a foreign port is authorized to arrest a person and send him to the United States for trial: which question, it is plain, extends to the broader inquiry of the power and the duty of a consul in regard to crimes committed within his jurisdiction by citizens of the United States.

We may omit from the inquiry the case of consuls in China and Turkey, who, by statute, exercise judicial authority respecting the acts of Americans in those countries. (Act of August 11, 1848.)

Consuls to the Barbary States are invested by treaty with judicial authority. But that authority has not been expressly affirmed by a statute. And although Egypt, certainly, and perhaps Tunis and Tripoli, may be regarded as dependencies of Turkey, and so comprehended by the statute, yet so much cannot be said of Morocco, Muscat, Japan, nor of sundry other countries out of the pale of international law of Christendom.

Leaving these countries to be spoken of in the sequel, my first object will be to consider the criminal jurisdiction of consuls in the countries of Christendom: that is, their general criminal authority.

Mr. Blythe refers, not without reason, to the absence of any satisfactory information on this point. There is nothing explicit regarding it in any act of congress. Indeed, the only provision of possible reference to it, is a phrase in one of the acts, making it the duty of consuls to "*discountenance* insubordination by every means within their power;" meaning, of course, insubordination among seamen on board merchant ships of the United States.

We are thus remitted to the general rules of our own public law and of that of nations, including treaties, for the desired information.

Consuls are not, by our law, judges; or, to use the language of Mr. Justice Ware, "no portion of the judicial power of the United States is conferred on consuls." (The William Harris, Ware's Rep. p. 367, 379.) In so far as they determine the civil controversies of their countrymen, they do it only as arbi- (382) ters; and, in criminal matters, their authority is one of police only, not of judicial decision. (Kent's Com., vol. 1, p. 42.)

This police authority, indeed, goes no further than detention of an accused person, or, at most, the examination of the case, to see whether there be cause of detention. And, even then, it applies only to matters occurring on shipboard; for the local jurisdiction is complete as to things occurring on shore. In such matters, the consul may intervene voluntarily, and sometimes he should do so officially, in the interest of his countrymen; but he cannot exercise jurisdiction.

The question of his jurisdiction regarding criminal acts occuring on shipboard, is all, therefore, which it is profitable here to consider.

As to such acts, it is obvious, in the first place, that the power of the consul cannot be greater than the power of his country. Hence the preliminary question is of the penal scope of the laws of the United States.

That is defined by statute. It comprehends piracy wherever committed. The pirate is *hostis humani generis,* and triable in any country. Beyond this, it comprehends acts "done upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." (Act of April 30, 1790, s. 8.) All such acts, committed by Americans, are of the jurisdiction of the courts of the United States, and may come before a consul in some form requiring action or direction on his part. Thus, if a crime be committed on the high seas, the master may detain the party for trial; on touching at a port the party may apply to the consul for discharge; and it may be the duty of the consul either to grant or refuse the discharge; and, in the latter case, he may have occasion to call on the local authorities to aid in detaining the party, or in providing to send him home for trial. And the same series of incidents may occur in regard to acts, happening on shipboard, while the ship is actually in a foreign port, but not falling within the local jurisdiction. (See Opinion of September 6, 1856.)

The power of the consul is to refuse to discharge, or at most, to detain, or call on the master, or the local authorities, or a man-of-war of his country, to detain, a person so charged with crime.

(383) The new "consular regulations" say that "if a citizen of the United States be charged with a criminal offence alleged to have been committed at sea, on board of an American vessel, (or on such vessel in port, under such circumstances as give jurisdiction to the courts of the United States,) it will be the duty of the consular officers to require that the individual so accused be delivered to him to be sent home for trial." (Nos. 384, 385.) All that is but *detention* by or at the instance of the consul, for the purpose of trial in the United States.

But, in order to determine whether he shall detain, or require detention, the consul must inquire into, and in some sense judge and decide, the question of culpability. That is true.

In what manner, and by what rule, shall he inquire and judge? I think he must, of necessity, inquire in the usual way, that is, by hearing testimony, not as a judicial officer, to be sure, but as consul. As to judgment, that is, deciding whether to detain or not to detain, he

must have large discretion. I agree with Mr. Blythe in thinking that he need not detain upon such mere suspicion of guilt, as would justify an examining magistrate in holding to bail within the United States. There is no judge at hand to supervise the propriety of such detention by writ of *habeas corpus*, or to admit to bail on motion. The consul, in order to induce him to detain, may well require stronger probable cause of belief in guilt than an examining magistrate. He may do this in the interest of the party. And he may do it in the interest of the government, which must defray the expenses of the detention and custody of the party, and of his conveyance to the United States.

If a crime be committed on board an American vessel on the high seas, the ascertainment of it, and the security of the person of the assumed criminal, belong in the first instance to the master. He is the legal superior of all on board, and has quasi-magisterial authority to maintain order, repress crimes, and provide for their ultimate punishment by law.

The received text-books, and the occasional adjudications touching this point, do but imperfectly exhibit the true extent and nature of the master's authority in this respect,—in consequence of the subject having been too generally considered from (384) the single point of view of the degree of power of the master in the repression or summary punishment of insubordination on the part of seamen. In seeking to measure the degree and quality of his coersive power in this respect, they have adopted the dictum of Casaregis, to the effect that he has no jurisdiction over the crew, but only a sort of economic authority or discipline, like that of a parent over his children, schoolmaster over his scholars, and lord over his slaves or servants. (Disc. 136, No. 14.) But every one sees that we have here analogy only, and that analogy confined to the single fact of the chastisement of a seaman, an analogy even there which in some respects goes too far, and in others not far enough. (Perkins' Abbott on Shipping, p. 234, note.) Accordingly, when the case in hand has appeared to be one of the excess of authority, courts are prone to deny that his power is co-extensive with the paternal power. (Barger v. Little, Ware's Rep. p. 506.) Then, again, if the case be one of justifiable severity by the master, the court has to look beyond the range of a father's or schoolmaster's power for his justification. (United States v. Hunt, ii Story's R. p. 120.) So that, one learned judge, while properly denying to the master any judicial authority, and saying that he is no *praefectus morum*, quotes, in the next breath, for approbation, the saying that he has power of discipline *pro corrigenda male morata*

vita. And another learned judge, with similar doubts as to the supposition of the master's authority being military in any sort, yet concedes that it is "of a peculiar character, and drawn from the usages, and customs, and necessities of the maritime naval service." In all these speculations, the courts appear to have disregarded that most necessary of all necessities, the police authority of the master, as illustrated in the condition of things on board of a ship engaged in the transportation of passengers, and especially emigrants in large bodies. In such ships, it becomes plain that the master is neither a parent nor a pedagogue, but the only possible present representation of the public authority of his country.

Our law books commonly quote, from the *Notabilia* of Roccus, a dictum on this point which Roccus himself quotes from D'Juan de Hevia Bolaños, to wit, the statement that "the mas- (385) ter of the ship has power to confine offenders in the vessel, even though they are not mariners, for the purpose of delivering them up to the competent authority of the territory or district nearest to the place where the offence was committed. Or he may confine them in the port where the ship is to be unladen, in order to have them punished." (Ingersoll's Roccus, p. 21.) And this all admit to be a good law.

The dictum itself is founded by Bolaños on the text of the Partidas. (Part 5 ta, tit. 8 & 9.) The proposition in Bolaños is stronger than it appears in Roccus: for the former says that the master may arrest any delinquent, *aunque sea clerigo*, that is, not amendable to the secular jurisdiction. (Curia Felipica, lib. iii, c. 4.) And Dominguez, in commenting on this passage, refers to numerous authors who have discussed and settled the power of the master in this respect. (Ilustracion á la Curia Felipica, tom. ii, p. 110.)

And it may happen that the power of the master will, by force of the same circumstances, devolve on the mate; as if the master became insane, or shall himself commit a crime of aggravated character. (Ibid.)

Now, the authority of the consul in the premises necessarily follows from that of the master; for if the offence be committed in port, or so soon as the ship arrives in port, it becomes the duty of the consul, by express provision of the statute, to receive and hear the complaints of the ship's company. (Act of July 20, 1840, § 16.) And, on the other hand, it is the right of the master, in such circumstances, to demand the assistance of the consul, who is to advise, aid, and, if need be, direct, the master as to the further detention of the party as a criminal, and his immediate transmission to his country. This thing the consul does officially, in the exercise of his *ministerial* auth-

ority, (not judicial,) and as the local ministerial agent of the United States.

If the offence be committed in port, and the local authorities do not take jurisdiction, then, also, the consul is to advise and aid the master in the disposition of the party, in order to his transmission to the United States for trial. In neither case does the consul possess any criminal jurisdic- (386) tion. His obligations and his powers go no further than to inquire, in order to decide what his duty is in the given case,—to take evidence of the facts,—to collect and see to the preservation of documents and material proofs,—to draw up a statement of the facts to be reported to his government,—and if, in his judgment, the facts require it, to see to the further detention of the party, and his transportation in custody to the United States. (Consular Regulations, Nos. 308-315.)

These particulars of the duty of consuls are not expressly defined by statute. But they belong to the very function of consuls by the law of nations, and by the general practice of Christendom. (De Clercq et de Vallat, Guide Pratique, p. 356, 366.) And, in thus detaining criminals, the consul does not usurp any judicial authority. He has no judicial authority. His acts are ministerial only, such as any ministerial officer may lawfully perform, and which he performs, of course, as the only ministerial officer of competent authority at hand invested with general power as such.

Nay, in the absence of a magistrate, any private person may arrest a criminal for the purpose of taking him before a magistrate. (ii Hawk. P. C., ch. 12.) And to this question it is immaterial how far off the magistrate may be. The maritime jurisdiction of the courts of the United States is independent of space. It is just as perfect in the remotest seas of Europe or Asia as it is in sight of the harbor of Boston or New York.

The foregoing remarks apply more especially to the case of consuls in the governments of Christendom having treaty relations with the United States. Those of China and Turkey stand on their peculiar footing. As to those in other countries, it were to be wished that some legislative provision existed defining their power. While, in those other countries, our consuls have no power to judge, on the other hand we cannot recognize the local jurisdiction as we do in Europe or America, or in Asiastic or African countries dependent on Europe. To the ports, at least, of those other countries, it would seem that the criminal jurisdiction of the federal consuls extends. Crimes committed on board our ships, in such ports, are not committed within the jurisdiction of any state recognized by us as such.

(387) And parties committing crimes there, on shipboard, may, in my opinion, be detained by the consular agent for remission to the United States.

I am, very respectfully,

C. CUSHING.

Hon. Wm. L. Marcy, Secretary of State.

RIGHTS OF CONSULS

Foreign consuls have no right, on the trial of a person whose acts affect them as accomplices, to interpose by letter; but may appear as witnesses, or by counsel in aid of the defense of the party indicted.

Attorney General's Office,
September 17, 1855.

Sir: I desire to make a further suggestion in regard to the (470) trial of parties charged with recruiting soldiers in the United States for the service of the British government.

It is known that instructions on this subject were given by that government to its officers in the United States. We are told by Lord Clarendon that those officers had "stringent instructions" so to proceed as not to violate the municipal law,—that is, to violate its spirit, but not its letter. If so, the instructions themselves violate the sovereign rights of the United States.

But, in the mean time, every consul of Great Britain in the United States is, by the avowal of his government, subject to the just suspicion of breach of law; while, apparently, he must either have disobeyed his own government, or, in obeying it, have abused his consular functions by the violation of his international duty to the United States.

In these circumstances, it is deemed highly necessary that the British consul at Philadelphia, or any other officer of the British government, shall not be suffered to interfere in the trials, as he attempted to do on a previous occasion;—that no letter of his be read, except in the due form of evidence; and that if he have anything to say, he shall be put on the stand by the defense, in order that he may be fully cross-examined by the prosecution.

It is clear that he has no right, by any rule of public law, or of international comity, to be heard in the case by the court, other wise than as a witness, whether enforced or volunteer.

I have the honor to be, very respectfully,

C. CUSHING.

James C. Van Dyke, Esq., U. S. Attorney, Phila.

Vol. VIII, p. 476 (Cushing)

BRITISH ENLISTMENTS

Report to the president on the legal questions involved in the enlistment of troops by British officers in the United States.

Attorney General's Office,
May 27, 1856.

(Extract) Sir: I deem it incumbent on me to bring to your notice sundry passages in official communications of the British minister, Mr. Crampton, to his government, as they appear in the "Papers relative to Recruiting in the United States," recently presented to parliament, which contain palpable errors of statement touching me personally or my official action as attorney general.

1. In a letter to the Earl of Clarendon, of the 19th of November, 1855, in commenting on Mr. Marcy's letter to Mr. Buchanan, of the 15th of July, 1855, Mr. Crampton assumes that the British consuls, implicated in illegal enlistments in the United States, were prevented, by the tenor of my instructions to the district attorney of Philadelphia, from testifying to their alleged innocence. (Papers ut supra, p. 128.)

That statement is not true.

The district attorney was instructed to object to any attempt of the British consul to do what he had undertaken on a previous occasion to do, that it, to interfere in the trials by officious letters written for the purpose; but, instead of being forbidden, it was expressly suggested, that he should appear as a witness.

It is obvious, that it cannot be admitted that a person, who deems himself inculpated by judicial proceedings, be allowed to interpose in the trial by mere letters of denial or *ex parte* explanation.

He has no right, in law or courtesy, to any such privilege. If he desires to be heard, he must appear in a legal manner, that is to to say, as a witness, in order that he may be examined so as to elicit the truth.

The British consul at Philadelphia might have volunteered as a witness in the case of Hertz, if he had seen fit. He ought to have done so, if his testimony, lawfully given, could have (477) proved anything material, either to the prosecution or the defense.

There was nothing extraordinary in this particular matter, except the presumption of a foreign consul, in supposing that he might interfere by volunteer letters, to affect the course of criminal justice in the United States.

2. In Mr. Crampton's letter to the Earl of Clarendon, of Nov-

ember 27, 1855, it is alleged that the proceedings against Hertz and others, in Philadelphia, were instituted, not against the persons who were ostensibly arraigned, but against the British diplomatic and consular agents in the United States. (Ubi supra, p. 134.)

That is incorrect. The proceedings were *commenced* in March, 1855, when no suspicion was entertained, by this government, of the relation of Mr. Crampton and of British consuls to the illegal acts in question. It is true, however, that among the objects expected from, and accomplished by, the trial, was the legal ascertainment of facts alike important to the British government and that of the United States.

3. In the same letter, Mr. Crampton says that, at the time of the trial referred to, (September 21, 1855,) "the United States government must have known that all recruitment, legal or illegal, had been put to a stop to several weeks before." (Ubi supra, p. 134.)

That is a mistake. This government knew nothing on that point, at that time, except what Lord Clarendon had said in his letter to Mr. Buchanan of July 16, 1855, namely, that the British government had sent orders to put an end to "all proceedings for enlistment."

Lord Clarendon did not mention when the orders were sent; nor does the context of his letter show whether the orders spoken of applied to the United States only, or also to British America. At what time those orders took effect, to whom sent, and their exact scope, did not then appear of public notoriety, and was never communicated to this government.

This government well knew that recruitments took place in August; it did not know that they had ceased in August. So soon as it had satisfactory information of their cessation, in- (478) structions were given to desist from all further judicial proceedings, except against official agents of the British government. (Letter of the attorney general to Mr. McKeon, of October 20, 1855, ubi supra, p. 129.)

4. In the same letter Mr. Crampton says that the United States government must have known that the proceedings of Hertz were, from the moment he attempted to enter upon a system of recruitment, disavowed by her majesty's officers." (Ubi supra, p. 136.)

This is not so. This government knew the contrary of what is thus alleged. It knew that Mr. Crampton had corresponded with Hertz. (Ubi supra, p. 67.) It also knew that Hertz was officially employed and paid by Mr. Howe, as the latter has since declared on oath. (Ubi supra, p. 218.)

5. In his letter to the Earl of Clarendon, of March 3, 1856, Mr. Crampton assumes that he and the inculpated consuls were the real parties defendant, and then proceeds to argue on the further assump-

tion that they were prohibited from appearing in their own defense. (Ubi supra, p. 178.)

I have already commented upon and corrected the error of fact involved in these assumptions, in so far as regards the consul.

As to Mr. Crampton, he also could have offered his testimony, if he had pleased. If he suggest that considerations of diplomatic dignity would prevent this, the reply is, that considerations of diplomatic dignity should have prevented his engaging, in association with persons now said by him to be of equivocal character, in the systematic violation or evasion, for a period of nearly six months, of the municipal law of the United States.

He well knew, in April, that persons, in the actual pay of his government, were under prosecution in Boston, New York, and Philadelphia, and should then have anticipated that his name would eventually come in question before the courts of justice; all the personal annoyance, and other inconveniences of which he encountered voluntarily, and with no right now to complain of the consequences.

For the rest, the law of nations, it is true, exempts Mr. (479) Crampton from trial for misdemeanor; but it is idle for him to suppose that his hired agents in the commission of the misdemeanor, who are not themselves invested with diplomatic privilege, were to have it accorded to them otherwise, or that his participation in the acts perpetrated should not come under observation in a court of justice, without his being able to appear directly as defendant on the record.

6. In the same letter, Mr. Crampton repeats the erroneous statement that "the consuls were not allowed to be heard, on the trial of Hertz." (Ut supra, p. 179.)

I have already remarked on this point. I add, that on the trial of Wagner in New York, pains were taken to obtain the evidence of the active official agent of enlistment there, Consul Barclay's deputy, Mr. Stanley, but without success.

* * * * * * * * *

I have the honor to be, very respectfully,

C. CUSHING.

To the President.

Vol. IX, p. 96 (Black)

SPANISH DESERTERS

1. Under the treaty with Spain, and the act of congress which was made to carry it out, the apprehension and delivery of a seaman, who is alleged to be a deserter from a Spanish ship, is a judicial duty, and the state department cannot change what a judge has done.

2. To prove the fact of desertion, the treaty requires the exhibition of the ship's roll, with the name of the deserter upon it, and this is not met by the mere certificate of a Spanish consul.

Attorney General's Office,
September 24, 1857.

Sir: I have read the note addressed to you by the Spanish minister on the case of Manuel Castro, a deserter from the Spanish schooner San Juan Baptista, at Key West.

From that note, and from other papers on the same subject which you have sent me, it appears that the deserter was arrested after the vessel had put to sea, on a warrant issued by a justice of the peace. But he was discharged by a state judge on a writ of *habeas corpus*. The Spanish consul then applied to the district judge of the United States for another warrant, which was refused. This is the subject of complaint. You ask whether it is well founded, and what can be done to prevent a repetition of such grievances.

Under the treaty with Spain, and the act of congress which was made to carry out that and other treaties of the same kind, the apprehension and delivery of a deserter is a judicial duty. It must be performed according to the judgment and conscience of those to whom it is assigned. The judges are sworn to administer it faithfully according to the best of their learning and ability; and that is all that can be demanded of them. You cannot require them to decide a given question in a particular way; much less can you reverse a sentence already pronounced.

When a cause is pending before the courts in which our own or a foreign government has a special interest, the president will always see that the facts and the law shall (97) be properly presented by competent counsel, and sometimes he prescribes what line of argument shall be used. But the judges must be left to act upon their own separate possibility. Inasmuch, therefore, as this is a judicial duty, you cannot change what has been done, even if you are sure that it was done erroneously. Nor do I see what measures you can take which will be absolutely sure to prevent the same judge or another from doing the like hereafter.

But I think the decision was right. The treaty requires that in such a case the Spanish consul in American ports shall *exhibit* the ship's roll, and the name of the deserter must *appear* in it before he can be arrested, held in custody , or delivered. The act of congress (4 Stat. at Large, 360) declares that the arrest may be made *on proof by exhibition* of the register of the vessel, ship's roll, or other official document. Here there was no exhibition of the roll, or any other

corresponding document which contained the names of the ship's crew. The consul produced an extract from the roll, certified by himself, but he did not exhibit the original roll carried by the vessel, as the treaty in plain terms required him to do.

It might be convenient, in cases like this, to dispense with the production of the original document, and let the rights of the person claimed as a deserter depend on the mere certificate of a consul; but a written compact between two nations is not to be set aside for a shade or two of convenience more or less. The law is so written, and that is a sufficient answer to all that can be said against this proceeding.

I am, with great respect, yours, &c.,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX, p. 383 (Black)

TREATY BETWEEN PERU AND THE UNITED STATES

Under the treaty of 1851 with Peru, the United States are not bound to pay a consul of the Peruvian government the value of property belonging to a deceased Peruvian, on whose estate the consul was entitled to administer, which may have been unjustly detained and administered by a local public administrator.

Attorney General's Office,
August 2, 1859.

Sir: Juan del Carmen Verjel, a Peruvian citizen, died intestate, on board of the steamer Empire City, on her passage from New York to the Pacific, in May, 1858. Some personal property which he had with him at the time of his death was brought back to New York by the Pacific Steamship Company, and deposited with the public administrator. By the 39th article of the treaty of 1851 between Peru and United States, the Peruvian consul at New York was, *ex officio*, the administrator of his deceased countryman, and therefore entitled to the possession of the goods which the public administrator took and administered. The consul, therefore, had a right of action to recover the goods or their value. But, instead of bringing a suit, he applied through the state department for compensation out of the federal treasury. I think you are bound to dismiss his application. The treaty makes no promise that the government of the United States will put the personal property of a deceased Peruvian into the hands of the consul and keep it there, or else pay him the price of it. It secures to him simply the legal rights of an administrator, which consist, among other things, of authority to sue for goods of his decedent, if they are unlawfully taken or detained from him.

I repeat, that the act of the steamship company, and of the public administrator, in detaining the goods of the decedent from the Peruvian consul, was unlawful, and a wrong which may be justly complained of. The only error of the consul and the minister consists in seeking redress (384) where there is no authority to furnish it, and in refusing the justice which the judicial authorities would have given them for the asking. It appears that the district attorney of the United States, in pursuance of your instructions, tendered his services to institute and carry on the proper proceedings, and that the minister distinctly refused to allow the bringing of an action. If this refusal be persisted in, I know not what more we can do in this case.

I am, very respectfully, yours, &c.,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX, p. 384 (Black)

POWER OF AMERICAN CONSULS

1. An American consul, under the act of February 28, 1803, has no authority, by withholding a ship's papers, to compel payment of demands for which suit has been brought by a creditor, after her release on bond by the court.

2. Such consul, under the 28th section of the act of August 18, 1856, has authority to detain the papers of a ship to enforce only the payment of wages in certain cases and consular fees; but he has not a general power of deciding upon all manner of disputed claims against American vessels.

3. Such consul may recover the penalties incurred by the master of a vessel for neglecting to deposit his papers in a court of competent jurisdiction, but he has no right to enforce otherwise the payment of the penalties.

Attorney General's Office,
August 6, 1859.

Sir: I have considered the questions proposed by the American vice-consul at Valparaiso, which you have referred to me, arising out of his official proceedings in the case of the steamer *Independence*, of New York. On the 25th of March, 1859, this vessel arrived at Valparaiso, and her papers were deposited at the American consulate. She had previously arrived twice at that port and departed from it without depositing her register, as required by the act of 28th February, 1803. On the 30th of March several claims against the steamer were on file at the American (385) consulate. They were for consul's fees, for coal, for lighterage, for wages, and for an agent's services and expenses. The vice consul demanded the payment of these claims before returning the register, and also the payment of one thousand dollars penalties for the two previous violations of the act

of 1803. After much dispute the attorneys of the owner paid some of these demands under protest, and gave bond for the remainder, and the papers were given up.

The propositions submitted by the vice-consul are all embraced in the single question whether he was right. I think he was in error in two or three respects. To point out these will be the clearest and easiest way to answer your inquiry.

1. Some of the claims against the steamer were disputed. Suits had been brought for them and security had been entered. The vice-consul had notice of this; and he had, therefore, no right to compel the payment of the demands by withholding the ship's papers. After a vessel has been attached by a creditor, and has been released on bond, he cannot demand that the consul shall detain it. To do so would be vexatious, and perhaps deprive the owner of a just defense.

2. But nearly all the claims against this steamer were of a class over which the vice-consul had no jurisdiction. His right to enforce payment of them is claimed under that clause of the 28th section of the act of August 18, 1856, (11 Stats. at Large, 63,) which provides that "all consular officers are hereby authorized and required to retain in their possession all the papers of such ships and vessels which shall be deposited with them as directed by law , till payment shall be made of all demands and wages on account of such ships and vessels."

In the book of consular regulations, published in 1856, this clause is inserted, apart from the remainder of the section, and the word "such" is omitted. I think it should be construed in connection with the rest of the section in which it occurs, and with other parts of the same act. It refers to the demands and wages of which cognizance had (386) been given to consuls. It gives them no new jurisdiction, but simply provides a means of enforcing that which they already had. They can retain the papers, to compel the payment of wages in certain cases and consular fees; but they do not possess a general power of deciding upon all manner of disputed claims and demands against American vessels.

This view of the law does no violence to its language. The words "such ships and vessels" evidently refer to the ships and vessels previously mentioned. The terms "all demands and wages," being used in connection, warrant the belief that the former was employed in a limited sense. In its general import, it includes wages; and to construe it broadly, therefore, makes the sentence redundant. These are but slight grounds of construction, but they are strengthened by the more potent one, that a grant of judicial power is not to be taken by implication, and that it is not to be presumed that con-

gress intended to confer upon every consular officer an authority almost equal to that of a court of admiralty.

3. The vice consul also exacted the penalties incurred by the master of the Independence under the act of 1803. But by the terms of that act the penalty is "to be recovered by the said consul, vice-consul, commercial agent, or vice commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction." The law makes the consul the party to bring the suit, not the judge to decide it. In the case in hand the vice consul demanded the penalty, decreed it to be due, and enforced its payment.

4. The facts concerning the engineer's claim for wages are not very clearly stated. It does not appear upon what voyage they were earned. I will, therefore, intimate no opinion about it.

Yours, very respectfully,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX. p. 426 (Black)

DETENTION OF PAPERS OF A SHIP IN A FOREIGN PORT

An American consul in a foreign port has no power to retain the papers of vessels which he may suspect are destined for the slave trade.

Attorney General's Office,
May 3, 1860.

Sir: There is no statute which requires an American consul in a foreign port to retain the papers of vessels which he may suspect are destined for the slave trade. (427) If this power be not given by law, the want of it cannot be supplied by departmental regulation. When congress enumerated the grounds upon which a consul might detain the papers of a ship in a foreign port, this was omitted, no doubt for satisfactory reasons. If the commander and crew are bent on a piratical voyage, measures much stronger than this will be required. In such a case the vessel may be seized and sent into the United States for such proceedings as will not only break up the voyage, but condemn the vessel and punish the crew and officers as criminals. The naked right to detain vessels would be of little avail without the presence of some naval force to carry it into effect, and when such naval force is present, the commander can do all that is necessary under existing laws without any warrant from a consular officer.

Very respectfully,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX, p. 441 (Black)

CONSULAR FEES

1. No more than fifty cents can be charged for certifying invoices, and for certifying the place of growth or production of goods made duty free by the reciprocity treaty with Great Britain, although such certificate may be accompanied by an attestation of the official character of a magistrate, and of the value of the goods.

2. Consuls, as well as consular officers and agents, are subject to this restriction.

3. It applies to all the British North American Provinces included within the reciprocity treaty.

Attorney General's Office,
July 16, 1860.

Sir: I have considered the questions which you have referred to me in relation to consular fees in certain cases.

The third section of the act of March 3, 1859, making appropriations for diplomatic and consular expenses, provides:

"That the fees for certifying invoices, and for certifying the place of growth or production of goods made duty free by the reciprocity treaty, to be charged by the consul general for the British North American Provinces, and subordinate consular officers and agents in said provinces, shall be fifty cents for each certificate, and no more," (11 Stats. at Large, 404.)

On referring to the forms prescribed by the secretary of the treasury which were in use at the time of the passage of this act, and which are still employed, it appears that the consular certificate to an invoice is based upon an affidavit made by the shipper of the goods, either before the consular officer himself, or before some local magistrate. When the latter course is pursued, the consular certificate to the (442) invoice includes an attestation of the official character of the person who administered the oath. By the established tariff of fees, a consular officer is entitled to two dollars "for authenticating the signature of a governor, judge, notary public, or other officers," and it is contended that, notwithstanding the act of 1859, he may demand two dollars for that portion of the certificate to the invoice which attests the signature of the local magistrate. But this position cannot be maintained. Where an act of congress gives a certain compensation for an entire service, including several other duties, for which, by previous laws or regulations, specific fees were allowed, no more can be charged for the whole than the sum named in the latter statute.

Before the passage of the act of 1859, no person seems to have thought that the fee for a consular certificate to an invoice was more

than two dollars, although it included a certificate of the official character of the magistrate before whom the oath was made. But the argument which would make the fee amount to two dollars or more now, would have made it at least four dollars then. The fact that only two dollars were allowed for the entire consular certificate prior to the 3d of March, 1859, is important therefore in a double aspect. It shows that, by a settled construction of the tariff of fees, consuls were not permitted to make separate charges for two certificates included in one; and it also warrants the conclusion that the fee of two dollars for the combined services was the very thing which congress intended to reduce.

The obvious purpose of the third section of the act of March 3, 1859, was to diminish the costs of reciprocial trade between the British North American Provinces and the United States, in accordance with the spirit of the treaty. It is our duty to carry that intention into effect, and not to defeat it by an ingenious construction which would practically maintain the original fee bill.

Another question which you have referred to me is, whether the words "subordinate consular officers and (443) agents," in the act of 1859, include consuls. As defined in the 31st section of the act of August 18, 1856, they would not; but the definitions therein established apply only to that act and to former acts which were not repealed by it. It would be strange indeed if congress could declare that a particular word should have a certain meaning in all future legislation. This was not attempted by the section referred to, as its language plainly shows. We are therefore at liberty to construe the words "subordinate consular officers and agents," in the act of March 3, 1859, upon general principles, and I think it is clear that they were meant to embrace all consular officers below the grade of consul general. The subject-matter of the enactment was consular fees on goods made duty free by the reciprocity treaty. The intention of congress was to reduce those fees, and no apparent reason exists why fees charged by consuls should be excepted. They are included by the words of the law according to their common acceptation, and they are also within the spirit and reason of the statutes.

I am therefore of opinion:

1. That no more than fifty cents can be charged for certifying invoices, and for certifying the place of growth or production of goods made duty free by the reciprocity treaty, although such certificate may be accompanied by an attestation of the official character of a magistrate, and of the value of the goods.

2. That consuls, as well as other consular officers and agents, are subject to this restriction.

3. That it applies to all the British North American Provinces included within the reciprocity treaty.

Yours, very respectfully,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX, p. 496 (Black)

CLAIM OF J. T. PICKETT

A United States consul whose salary exceeds $2,500, is entitled to be paid his fees as commissioner for taking depositions in an admiralty proceeding in a United States district court.

Attorney General's Office,
October 16, 1860.

Sir: It appears from your letter of September 27, that J. T. Pickett, United States consul at Vera Cruz, by virtue of a commission from the district court of the United States for the district of Louisiana, took certain depositions in admiralty proceedings against the captured steamers "Miramon" and "Marquis de la Havana." He now asks to be paid his fees as commissioner; and the question submitted is, whether he can have them, it being admitted that his salary exceeds $2,500.

In the case of Converse vs. the United States, (21 Howard, 463,) the supreme court held that a collector of customs, who had received the maximum amount of his annual compensation as such, viz: $6,000, was nevertheless entitled to commissions upon certain purchases and disbursements made by him under the direction of the secretary of the treasury.

There is no difference in principle between the claim of Mr. Pickett and that of the collector's representative in the case which I have cited. The taking of these depositions was not the duty of the consul, as consul. The compensation of a commissioner is regulated by law, and I can see no objection to its payment which would not have ap-(497)plied with perhaps greater force to the payment of commissions to a collector who had received the full amount of his official compensation. I am free to admit, that the views of a majority of the judges upon this point are contrary to my own opinion, but nevertheless I cannot advise any action which will bring the executive and judicial authorities of the government into hostile collision.

Very respectfully, yours, &c.,

J. S. BLACK.

Hon. Jacob Thompson, Secretary of the Interior.

Vol. IX, p. 500 (Black)

CASE OF THE CONSUL AT HALIFAX

The penal provisions of the seventeenth section of the diplomatic and consular act of August 18, 1856, only apply to the taking of greater fees than are allowed by the act itself, and do not therefore extend to the taking of greater fees than are allowed by the third section of the act of March 3, 1859.

Attorney General's Office,
November 22, 1860.

Sir: I have the honor to say, in reply to your letter of October 6th, that the penal provisions of the seventeenth section of the diplomatic and consular act of August 18, 1856 (11 Stats. at Large, 58) only apply to the taking of greater fees than are allowed by the act itself, and do not therefore extend to a taking, by a consul in the British North American provinces, of greater fees than are allowed by the third section of the act of March 3, 1859.

If the consul at Halifax has received greater fees than were allowed by the latter act, and still retains them in his hands in consequence of a notice not to pay them into the treasury, he may be permitted in self-defence to return the excess over the legal amount to the proper parties. But beyond this the question of his liability is a personal one, upon which it is not the duty of the government to give him advice.

Very respectfully, yours, &c.

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. IX, p. 507 (Black)

CASE OF J. P. BROWN

By decision of the supreme court, a person holding two compatible offices or employments under the government is not precluded from receiving the salaries of both, by anything in the general laws prohibiting double compensation; but the prohibition in those laws extends to every case where (508) the duties for which extra compensation is claimed are performed without a regular appointment authorized by law.

Attorney General's Office,
November 24, 1860.

Sir: You have submitted to me several propositions in relation to the compensation of J. P. Brown, who has occupied various diplomatic and consular offices in Turkey since the year 1855. It is necessary to treat the items of his claim in detail, for they arise under different acts of congress, and cannot all be disposed of under one principle.

1. In the first place, he was appointed dragoman, and held that

office from July 1, 1855, until after the act of 1856 took effect. During this same time he was also authorized by your department to act as consul. I am disposed to regard him during that period as a vice-consul regularly appointed. The office was recognized in the legislation which existed previously to 1856, and the appointment was one which the state department had the right to make, (7 Opin., 512.) According to the decision of the supreme court in Converse vs. the United States, (21 How., 463,) a person holding two compatible offices or employments under the government is not precluded from receiving the salaries of both by anything in the general laws prohibiting double compensation, and this principle would appear to be applicable to this portion of Mr. Brown's claim.

2. On February 19, 1857, Mr. Brown was appointed consul-general. He also, from that date until the 23d of September, 1858, discharged the duties of secretary of legation and dragoman. It is very clear that he cannot be compensated for discharging these additional duties under the ninth section of the act of August 18, 1856, which provides for the case "when to any diplomatic office held by any person there shall be superadded another," because the office of consul-general which he held was not a diplomatic one. Nor do I think that the performance of these additional duties will entitle him to compensation under the decision of the court in the case of Con-
(509) verse vs. the United States. Had he, in addition to the office of consul-general, been actually appointed as secretary of legation and dragoman, the case would have been different. But the act of August 31, 1852, expressly declares that "no person who holds, or shall hold, any office under the government of the United States, whose salary, pay, or annual compensation shall amount to the sum of two thousand five hundred dollars, shall receive compensation for performing the duties of any other office." I understand the prohibition to extend to every case where the duties for which extra compensation is claimed are performed without a regular appointment authorized by law. The case of Converse was that of a collector, whose compensation, as such, amounted to more than two thousand five hundred dollars, but who also held a regular appointment as disbursing officer of the treasury department, and he was allowed also to receive the compensation authorized by law for such agency. I shall of course advise you to respect the authority of that decision, but I shall not advise you to stretch it a single inch.

3. On the 23d September, 1858, Mr. Brown was appointed secretary of legation and dragoman. For these two appointments he was entitled to receive three thousand dollars per annum, under the first section of the act of August 18, 1856. It is stated that after the

23d September, 1858, he continued to as consul-general, without regular appointment. For reasons already stated, he is not entitled to any compensation for performing the duties of that office.

Very respectfully, yours, &c.,

J. S. BLACK.

Hon. Lewis Cass, Secretary of State.

Vol. XI, p. 72 (Bates)

DEPOSIT OF SHIPS' PAPERS AT PORTS IN THE BRITISH NORTH AMERICAN PROVINCES

1. The master of an American vessel sailing to or between ports in the British North American Provinces is required, on arriving at any such port, to deposit his ship's papers with the American consul.

2. The act of August 5, 1861, does not change or affect the duties of masters of American vessels, running regularly by weekly or monthly trips, or otherwise, to or between foreign ports, as imposed by the act of February 28, 1803.

3. If an American vessel is obliged by the law or usage prevailing at a (73) foreign port to effect an entry, and she does enter conformably to the local law or usage, her coming to such foreign port amounts to an "arrival," within the meaning of the 2d section of the act of February 28, 1803, independently of any ulterior destination of the vessel, or the time she may remain, or intend to remain, at such port, or the particular business she may transact there.

4. The fees receivable by a consul for receiving and delivering a vessel's register and other papers, under the act of 1803, are prescribed by regulation of the president.

5. The act of August 5, 1861, was merely intended to limit the amount of fees payable annually to American consuls by the masters of American vessels running, by regular trips, to or between foreign ports.

Attorney General's Office,

September 7, 1866.

(73) (Extract) The act of 1803 affixes no fee to the service which a consul performs when he receives and delivers a vessel's register and other papers; but that service is made provision for in the tariff of consular fees prescribed by the president in accordance with the provisions of the act of August 18, 1856, regulating the diplomatic and consular systems of the United States. In the schedule of consular fees now in force the consul, for the service named, is entitled to charge *one cent* on every ton registered measurement of the vessel, if under one thousand, and for every additional ton over one thousand, *one-half of one cent.* (Circular No. 49, page 12, State Department, July, 1864.).....

I am, sir, very respectfully,

Your obedient servant,

EDWARD BATES.

Hon. Wm. H. Seward, Secretary of State.

Vol. XI, p. 508 (Speed)

JUDICIAL POWERS OF UNITED STATES CONSUL IN SANDWICH ISLANDS

Attorney General's Office,
June 26, 1866.

(512) (Extract) In making this agreement in regard to deserters, the two governments announced the principle, that the question whether the shipment of the seaman was lawful or not, is one which should be remitted to the authorities of the country to which the vessel belongs.

In the treaty with France, consuls are made judicial officers, and given cognizance of all the crimes, misdemeanors, and other matters of difference, in relation to the internal order of the vessel, which may supervene between the master, the officers, and the crew. The question whether a seaman is bound to fulfill the obligation imposed by the shipping-articles is certainly a matter of difference betwixt the master and one of the crew. The fact must be first determined that he is of the crew before the consul can take jurisdiction. Until the fact is made manifest that he is of the crew, no rules in regard to the internal order of the vessel can be enforced. Upon the question whether he is not of the crew, depends all the power and authority of the consul.

To say that the consul can decide all questions concerning the internal order of the vessel, except the question whether the man is or not of the crew, is, in effect, destroying his jurisdiction, making it of no value, by depriving him of the power to determine conclusively the very question upon which all order in the vessel can be supported. Unless consuls have the power to decide, and to decide without interference from the local courts, who compose the crew, it seems to me that all their judicial powers are idle. It is a question concerning the internal order of the vessel; because upon it depends all right to impose and enforce rules for the government of the crew, and each member of (513) the crew. If such is not the case, the consuls could not rightfully take cognizance of any case until the local courts had passed upon the validity of the shipping-articles, and any and every seaman could arrest the proceedings of the consuls, by pleading that he had signed when he was drunk, or had been coerced by force, or induced by fraud to do so,

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I am, sir, very respectfully,
Your obedient servant,
JAMES SPEED.

Hon. Wm. H. Seward, Secretary of State.

Vol. XII, p. 1 (Stanbery)

NOTARIAL POWERS OF AMERICAN CONSULS

1. No law or regulation requires an American consul to certify to the official character and acts of a foreign notary public.

2. Consuls of the United States are authorized, by the 24th section of the act of August 18, 1856, to perform any notarial acts; but a certificate as to the official character of foreign notary is not a notarial act.

Attorney General's Office,
August 1, 1866.

Sir: I have received your letter of the 24th ultimo, with its enclosures.

It appears that a power of attorney, purporting to be executed at Liverpool, by Edward Lawrence, and acknowledged before a notary public at Liverpool, has been presented to Mr. Dudley, our consul at that place, for his official certificate, that the notary public was duly authorized, admitted, and sworn, and that full faith and credit are due to his notarial acts. Mr. Dudley states that this power of attorney has relation to property acquired during the war, in violation of the proclamations of the president and acts of congress, and by parties who were actively engaged in running the blockade. Under these circumstances, Mr. Dudley had doubts as to whether he ought to verify the paper; and you ask my opinion upon this question, and whether you may lawfully instruct Mr. Dudley to withhold his verification. I do not find that there is any law or regulation which compels a consul to give (2) such a certificate as that in question, even in aid of a lawful purpose. The 24th section of the act to regulate the diplomatic and consular system of the United States, approved August 18, 1856, (11 Stats., 60,) authorizes any consular officer to perform any notarial act or acts, such as any notary public is required or authorized by law to do or perform within the states.

The certificate in question does not fall within the functions of a notary; and besides, if it were a notarial act, the duty is not imperative. The 22d section of the same act vests the president with authority to give such orders and instructions to all diplomatic and consular officers, touching the transaction of their business, as may not be inconsistent with the constitution or any law of the United States. I am, therefore, of opinion, that you may lawfully instruct the consul not to verify this paper.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. Wm. H. Seward, Secretary of State.

Vol. XII, p. 97 (Stanbery)

COMPENSATION OF CONSULAR AGENTS

1. The 3d section of the act of June 15, 1866, is limited to unsalaried consuls and commercial agents.

2. Consular agents are entitled to the compensation allowed them under the 15th section of the act of August 18, 1856.

3. The fees of consular agents, receivable under the act of 1856, are not returnable in the accounts of the consuls, to whom they are subordinate, under the act of 1866.

4. The fees collected by consular agents, which are payable under the act of 1856 to their principals, are returnable in the accounts of such principals.

Attorney General's Office,
November 22, 1866.

Sir: I have considered the question which you have stated as arising upon the 3d section of the act of July 25, 1866, making appropriations for the consular and diplomatic expenses of the government for the year ending June 30, 1867, and for other purposes.

That section provides as follows: "That all fees collected by any consul or commercial agent not mentioned in schedule B or C, by any vice-consul or commercial agent appointed to perform their duties, or by any other person in their behalf, shall be accounted for to the secretary of the treasury in the same mode and manner as is provided for in section 18 of the act approved August 18, 1856, entitled 'An act to regulate the diplomatic and consular system of the United States.' And when the fees so collected by any such consul or commercial agent amount to more than $2,500 in any one year, over and above expenses of office rent and clerk hire, to be approved by the secretary of state, of which return shall be made to the secretary of the treasury, the excess for that year shall be paid to the secretary of the treasury in the mode provided for by said act."

The first question which you state is, whether, under this provision, the fees collected by a consular agent are to be considered as his own fees, or as forming a part of (98) those collected and returned by the principal consular officer by whom he is nominated and to whom he is subordinate? I do not think that consular agents are embraced at all by the 3d section of the act of 1866. Their compensation is still, in my opinion, governed by section 15 of the act of August 18, 1856, which entitles them, as compensation for their services, to such fees as they may collect in pursuance of the provisions of that act, or so much thereof as shall be determined by the president. (11 Stats., 57.) Consular agents are not consuls or commercial agents within the meaning of the laws regulating the consular system of the United States.

They are defined by section 31 of the act of 1856 as consular officers, subordinate to consuls and commercial agents, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively at ports or places different from those at which such principals are located. Whenever congress has intended to include them within any provision of law, it seems to have mentioned them specifically, or employed the general expression "consular officers," which describes subordinate as well as principal officers in the consular service.

Under the 15th section of the act of 1856, the fees of consular agents, or so much thereof as they are allowed to retain by regulation of the president, appear to accure to them in their own right, and not in that of the principal officers of the consulates. This provision is not changed or modified in any particular by the law of 1866. The fees they may be entitled to retain under the act of 1856 are not, therefore, to be considered as forming any part of those collected and returned by their principal consular officers.

The 15th section of the act of 1856 provides also that "the principal officer of the consulate or commercial agency within which such consular agent shall be appointed shall be entitled to the *residue,* if any, in addition to any other compensation allowed him by this act for his services therein." I understand by this, that if a consular agent is (99) not allowed, by the regulation of the president, to retain all the fees he may collect, the *residue,* being the difference between all the fees so collected and the amount which the agent is authorized to retain, is payable to his principal. Now, question may be made whether the amount of fees thus received by such principal, if an unsalaried consul or commercial agent, is returnable in the principal's account to the secretary of the treasury, and constitutes part of the fund out of which the maximum of $2,500 is allowed under the act of 1866? I am of opinion that this question must be answered in the affrmative. I think that each unsalaried consul must return, under the act of 1866, all the fees collected by himself, or by any one on his behalf, and also the amount of fees which he may receive through his consular agents.

But I do not think that any part of the fees which the agents are authorized to retain, by regulation under the act of 1856, is returnable in the accounts of their principals.

It will be perceived that no limitation of amount is imposed by the act of 1856 upon the fees retainable by consular agents. The limitation of $2,500 is applicable only to the compensation of the principal consular officers who are mentioned in the 3d section of the statute.

The second question on which my opinion is asked is, whether the section referred to is to be considered as limited to unsalaried principal consular officers?

There can be no doubt that it is so limited.

The consuls and commercial agents not mentioned in schedule B or C are those who receive no salaries, but are compensated by fees, and the restricting clause applies exclusively also to that class of consuls and commercial agents. Consular agents subordinate to salaried consuls are not affected by the 3d section of the act of 1866 any more than those attached to unsalaried consulates. Both classes of consular agents are still governed, in respect to their compensation, by the provisions of the general law of 1856.

I am of opinion, therefore, as follows:

(100) 1st. That the 3d section of the act of June 15, 1866, is limited to unsalaried consuls and commercial agents.

2d. That consular agents, whether subordinate to salaried or unsalaried consuls, are entitled to the compensation previously allowed them under the 15th section of the act of August 18, 1856.

3d. That the fees which consular agents, subordinate to unsalaried consuls, may be allowed to retain for their own compensation, under the act of 1856, are not returnable in the accounts of the consuls under the act of 1866; and,

4th. That the amounts of fees collected by such consular agents, which are payable to, and received by their principals, under the act of 1856, and regulations pursuant thereto, are returnable in the accounts of the principals.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. Wm. H. Seward, Secretary of State.

Vol. XII, p. 124 (Stanbery)

CITIZENSHIP OF CONSULAR OFFICERS

The act of February 28, 1867, forbidding the payment of compensation to any consul or commercial agent of the United States who is not a citizen of the United States, does not apply to deputy consuls, consular agents, vice consuls, and vice commercial agents.

Attorney General's Office,

March 6, 1867.

Sir: I have the honor to say, in reply to the inquiry made in your letter of the 28th ultimo, that I am of opinion that the words

"consul or commercial agent," in the provision of the act of February 28, 1867, which forbids the payment of compensation to any "consul or commercial agent who is not a citizen of the United States, native or naturalized," are not to be construed as including subordinate or substituted consular officers, such as "deputy consuls," "consular agents," "vice consuls," and "vice commercial agents." It would have been very easy for congress to have declared its intention to embrace such consular officers within the prohibition of the act if it had meant to include them, and the omission to do so must be taken as strong evidence of an intention to exclude them.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. Wm. H. Seward, Secretary of State.

Vol. XII, p. 463 (Evarts)

CASE OF DESERTERS FROM PRUSSIAN FRIGATE "NIOBE"

The provisions of the treaty of May 1, 1828, between the United States and Prussia, for the arrest and imprisonment of deserters from public ships and merchant vessels of the respective countries, applies to public vessels sailing under the flag of the North German Union and deserters from such vessels.

Attorney General's Office,

August 19, 1868.

(465) (Extract) In regard to naval vessels of the North German Union, I am clearly of opinion that they are the ships of war of Prussia, within the meaning of the treaty of 1828, and that deserters therefrom may be arrested by the proper local authorities of the United States, on the application of the proper consular officer of the Union, pursuant to that treaty. I have referred incidentally to those provisions of the constitution of the Union, which declare as follows:.....

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. Wm. H. Seward, Secretary of State.

Vol. XIV, p. 520 (Williams)

PROPERTY OF DESERTING SEAMEN

Four seamen deserted from an American merchant-vessel in a foreign port, leaving in the hands of the master, besides what was due them as wages, some clothing and other effects, all of which the master delivered to the United States

consul at the port on the demand of the latter. By instructions from the state department, the consul sold the clothing, &c., and forwarded the proceeds thereof, with the amount due the seamen as wages, to that department. No proceedings have been instituted against the seamen for the offense of desertion. Upon the question as to what disposition should be made by the department of the money: Advised that the funds, together with a statement of such facts touching the case as may be in the possession of the department, be transmitted to the circuit judge for the district wherein the port is in which the vessel is owned or at which her voyage terminated.

A consul has no authority to demand and received from the master of a vessel the money and effects belonging to a deserter from the vessel.

The steps which should be taken by the master, with reference to the disposition of such property, indicated.

Department of Justice,
January 28, 1875.

Sir: From your communication of the 20th instant, I gather the following facts, which seem to be material to a consideration of the questions submitted by you:

In the month of September, 1874, four seamen deserted from the bark Bolivia at the port of Rotterdam, whither she had arrived after a long voyage. The vessel was American, out of the port of Boston. Each of the deserters left an amount of money due them as wages, and some clothing and other effects, in the hands of the master of the vessel. He delivered the money, clothes, &c., to the United States consul at Rotterdam, at his request. Under instructions from the department of state, the consul sold the clothing and other effects of the deserting seamen, and forwarded the proceeds, together with the money due them as wages, to that department, which now holds the fund. No proceeding has been instituted against the men for the crime of desertion, and there has been no judgment of forfeiture.

The questions are: What disposition should be made of this money, and what course should be pursued in similar cases?

(521) I have first to observe that the consul acted without warrant of law in demanding and receiving from the master of the vessel the money and effects of the deserters. It is only in case of the death of a seaman, and under the circumstances indicated in the second division of section 4539, Revised Statutes, that any consular officer is authorized to require the money, wages, &c., of a seaman to be delivered to him.

The proper steps for the master of the vessel to have taken on the desertion of the men are pointed out in sections 4597, 4599, and 4604, Revised Statutes. If he was unable to find and arrest them, it was his duty to take charge of and hold their clothes, effects, and wages until his arrival at the port at which his voyage terminated. At that

port, which I suppose was Boston, he should, although no forfeiture was as yet declared, have delivered the balance of the property, after deducting the expenses occasioned by the desertion, to the shipping-commissioner, to be by him paid over to the judge of the circuit court of the United States for the district of Massachusetts; for the property was held by the master as forfeited, and the law forbids the master or owner of the vessel to keep it, but directs that it shall be held by the judge of the circuit court for the purposes indicated in sections 4604 and 4610, Revised Statutes. The law does not require that there shall be an actual judgment of forfeiture before it becomes the duty of the master to pay over to the shipping-commissioner. If it were so, there would seldom be a case of forfeiture, and the fund for disabled seamen would not be benefited largely from this source.

Undoubtedly, upon being put in possession of the facts, the circuit judge would, in a case like the present, direct the district attorney to proceed according to law to obtain a judgment. But if the deserters should not appear, and cannot be found in due time so that service can be had upon them, I think the law requires that the money and the proceeds of the effects left by them with masters of vessels, after deducting expenses, &c., should go into the treasury, to be added to the fund for the relief of sick, disabled, and destitute seamen . (Sections 4545, 4604, and 4610, Rev. Stat.)

In the present case I would advise that the fund should be transmitted, together with such facts and evidences touching (522) the case as may be in the possession of the department of state, to the circuit judge for the district in which the port is where the bark Bolivia was owned, or at which her voyage terminated; and this, because such would have been the destination of the fund if the course pointed out by the law had been pursued, and for the further reason that the deserting men may yet appear and, peradventure, show that their desertion was excusable, as in the case indicated in section 4600, Revised Statutes, or prove such a state of facts as would induce the judge to reduce the penalty.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. Hamilton Fish, Secretary of State.

Vol. XV, p. 178 (Taft)

MERCHANT VESSELS—JURISDICTION

A merchant vessel, except under some treaty stipulation otherwise providing, has no exemption from the territorial jurisdiction of the harbor in which the same is lying.

The right "to sit as judges and arbitrators in such differences as may arise between the captains and crews," given to consuls, vice-consuls, &c., by article 18 of the treaty with Sweden and Norway of 1827, is limited to the determination or arbitrament of disputes and controversies of a civil nature, and does not extend to the cognisance of offenses.

If the conduct of the captains or of the crews, where differences arise between them, is such as to "disturb the order or tranquillity of the country," (which includes all acts, as against each other, amounting to actual breaches of the public peace,) the right of the local authorities to interfere, in the exercise of their police and jurisdictional functions, is reserved in said article.

Semble **that a more enlarged jurisdiction is conferred upon consuls in some other treaties, as e. g., in the treaty with France of February 23, 1853, in the treaty with the German Empire of December 11, 1871, and in the treaty with Italy of February 8, 1868.**

Department of Justice,
December 14, 1876.

Sir: I have the honor to state that since the receipt of the communication addressed to me by the Hon. J. L. Cadwalader, acting secretary, under date of the 14th of October last, in regard to the proceedings had before a justice of the peace in Galveston, Tex., against a part of the crew of the Swedish bark Frederica and Carolina, a merchant vessel, I have received a further report from the United States attorney for the eastern district of Texas, to whom a copy of that communication was sent. This report, together with the statement of the United States district judge therein referred to, I enclose herewith, and beg that they be returned to this department when no longer needed by you.

The communication of the acting secretary contains a request for an expression of opinion touching the jurisdiction of the justice in the proceedings mentioned. I have considered the subject in the light of the information furnished by your department and by the United States attorney, and will now proceed to give my views thereon.

The facts appear to be these: While the above-named vessel was lying in Galveston harbor, a quarrel arose on board (179) thereof between the two mates and the cook, which resulted in the beating of the latter by the former. The cook made complaint to the justice of the peace above referred to, charging the mates with assault and battery. The accused were brought before the justice, a trial was had, they were convicted, and were each fined $5.

The general rule of law is that, except under some treaty stipulation otherwise providing, a merchant vessel has no exemption from the territorial jurisdiction of the harbor or port in which the same is lying; and it is assumed that the justice had cognizance of the complaint in this case, and that the proceedings before him are not open to objection, unless the jurisdiction of the local authorities was taken

away by the following provision in article 13 of the treaty with Sweden and Norway of 1827, viz:

"The consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captains should disturb the order or tranquillity of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported."

The only right which, by the terms of the above provision, is granted to consuls, vice-consuls, &c., is the right "to sit as judges and arbitrators in such *differences* as may arise *between the captains and crews;*" and the recipients of the right may, in order "to cause their decision to be carried into effect or supported," demand the assistance of the local authorities. This right would seem to be limited to the determination or arbitrament of disputes and controversies of a civil nature, and not to extend to the cognizance of offenses. And such, indeed, appears to have been the understanding of congress, as is shown by the act of August 8, 1846, chap. 105, which was designed for the more effectual enforcement of the provision. That act, after setting out the provision in a preamble, proceeds to confer upon the district and circuit courts of (180) the United States, and United States commissioners, authority to issue, upon the application of the consul, all proper remedial process, mesne and final, to carry into full effect the "award, arbitration, or decree" of such consul, and to enforce obedience thereto by imprisonment, &c. The language of the act is plainly inapplicable to any judgment or sentence pronounced by the consul against one of the officers or crew of a vessel for an offense; indicating that congress did not regard the provision in the treaty as imparting to him any criminal jurisdiction whatever.

On the other hand, if the conduct of the captains or of the crew, where differences arise between them, is such as to "disturb the order or tranquillity of the country," the right of the local authorities to interfere, in the exercise of their police and jurisdictional functions, is distinctly reserved by the above-mentioned provisions. This reservation, taken strictly, includes all acts on the part of the captains and crews, as against each other, amounting to actual breaches of the public peace; and in this sense it may, perhaps, cover the case under consideration.

In the jurisprudence of some countries, especially of France, the

general rule of law already adverted to is so far relaxed in practice as that all acts relating to the interior discipline of the vessel, and even all offenses committed on board by one of the crew against another which do not affect the tranquillity of the port, are excluded from the local jurisdiction—all such matters being left to the cognizance and disposal of the consul, and the local authorities being authorized to interfere only when their aid or protection is formally required by him. And by some jurists this doctrine is laid down as a rule of international law, which operates in default of treaty stipulations. But though that view does not generally prevail, and the practice about to be stated proceeds on a contrary view, the same doctrine has, to a greater or less degree, been formally introduced into nearly all modern commercial treaties between nations engaged in maritime commerce. See, for example, the eighth article of our treaty with France of February 23, 1853; the thirteenth article of our treaty with the German Empire of December 11, 1871; and the eleventh article of our treaty with Italy of February 8, 1868. The (181) feature common to these articles is, that besides the cognizance of differences that may arise between the officers and crew the consul is to have "charge of the internal order" of the vessel, to the exclusion of the local authorities. And by the act of June 11, 1864, chap. 116, providing for their execution, they are described as extending to "controversies, difficulties, or disorders," &c.; and authority is given to any judge of a United States court and to any United States commissioner, upon application of the consul as there provided, to cause the person complained of to be brought before such judge or commissioner for examination, and if he shall find "a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign ship or vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States," he is required to commit the accused, &c. Thus the doctrine above referred to would seem to prevade the last-mentioned treaties, and to be recognized by congress, so far at least as it respects acts and offenses that affect the internal order and discipline of the vessel, and which do not disturb the peace of the port.

If the provision in the treaty with Sweden and Norway, quoted above, be interpreted as in effect conferring the same powers upon the consul as are imparted by the other treaties cited, the jurisdiction of the justice in the present case would seem to depend upon whether the offense complained of was of a nature to affect only the interior discipline of the vessel and whether it did or did not disturb the public peace. Here, however, the information furnished is so meager as

to lead to nothing definite or satisfactory on that point. In the absence of evidence to the contrary, it is fair to presume that the justice has not exceeded his jurisdiction.

I will observe, in conclusion, that in my opinion the view of the United States district judge for the eastern district of Texas, as stated in his accompanying letter, touching his jurisdiction in the *habeas corpus* case mentioned by him, is erroneous. By virtue of section 753 of the Revised Statutes, the writ extends to any one who is in custody in violation of a treaty of the United States; and if, at he hearing, it should (182) appear that the party is imprisoned in violation of a treaty, he may and ought to be discharged. The case to which the district judge refers involved the question whether the commitment violated a treaty; a question over which he undoubtedly had jurisdiction under the above named section.

Very respectfully, your obedient servant,

ALPHONZO TAFT.

Hon. Hamilton Fish, Secretary of State.

Vol. XVI, p. 268 (Devens)

DISCHARGE OF SEAMEN IN FOREIGN PORT

The action of a consul, in the exercise of the discretion given him by sections 4580, 4581, 4583, and 4584, respecting the discharge of seamen in a foreign port, is not reviewable otherwise than by some competent court.

Where a consul has collected extra wages of the master of a vessel in a foreign port, or requested the collection of such extra wages on the arrival of the vessel in the United States, it is not competent to the secretary of the treasury or any bureau of the treasury department, in the examination of the accounts of the consul, to do anything more than revise the amount of the collection and determine its arithmetical accuracy.

Department of Justice,
February 20, 1879.

Sir: Yours of the 2d ultimo calls my attention to sections 4580, 4581, 4583, and 4584 of the Revised Statutes, relating (269) to the collection from the master of a vessel of extra wages on account of a seaman discharged by the order of the American consul in a foreign port, and requests an expression of my opinion upon the following questions, viz:

1. "When, in the exercise of the discretion vested in him by the sections of the statutes referred to, a consular officer shall have decided that a discharge of seamen should be granted, is that decision to be regarded as final and conclusive, and subject to no revision other than by a court of competent jurisdiction?

2. "When a consular officer shall have collected extra wages of the master of a vessel in a foreign port, or shall have requested collection of such extra wages on the arrival of a vessel in the United States, is it competent for the secretary of the treasury, or any bureau of the treasury department, in the examination of the accounts of said officer, to do anything more than revise the amount of said collection?"

An examination of these sections, and reference to section 1736, making the consul civilly and criminally liable for any abuse of power, leads me to conclude that his action is not reviewable otherwise than in some competent court, and that the treasury department has only to examine the account to determine its arithmetical accuracy, and not to treat the question of the original propriety of the discharge as though it were *de novo,* before that department upon appeal.

I therefore answer your first question affirmatively, and the second in the negative.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. John Sherman, Secretary of the Treasury.

Vol. XIX, p. 16 (Garland)

FOREIGN CONSUL

A foreign consul, resident in the United States, must look for protection in his person and property to the laws of the state in which he resides.

Department of Justice,
May 5, 1887.

Sir: In reply to your communication of the 21st of April, 1887, calling my attention to certain complaints of the imperial German consul at Cincinnati, Ohio, I beg to say that as the case does not come within section 4062, Revised Statutes of the United States, the consul must look for protection to the laws that protect the rights of the community in which he resides. The laws that protect the President of the United States in his person and property are the same as those that protect the humblest citizen, and if the personal or property rights of that high functionary should ever be violated in the city of Cincinnati he would have to look for protection to the laws of the state of Ohio. Certainly a foreign consul cannot justly complain that he is not better protected than the highest officer of the government of the United States.

It results, then, that the case presented is not one in which I can give Assistant United States Attorney Bruce any instructions.

Very respectfully, yours,

A. H. GARLAND.

The Secretary of State.

Vol. XIX, p. 22 (Garland)

CLAIM OF S. B. PETERSON

The crew of an American vessel, wrecked on the South Pacific Ocean, were supplied with necessary clothing by a United States consul, who, on learning that wages were due them, applied to the master of the vessel to pay for the clothing out of the wages due, which the latter did. On their arrival in the United States the crew brought suit against the owners of the wrecked vessel for their wages, and recovered a judgment therefor: Advised, that such owners have no valid claim against the United States for the money paid by the master, as above; that their remedy, if any they have, is against the consul and the sureties on his bond.

Department of Justice,

May 14, 1887.

Sir: Your communication of the 21st of April, 1887, requesting an opinion on the claim of S. B. Peterson, Esq., asking to have refunded to him by the United States the sum of $218.99, being the amount, including costs, decreed against the owners of the wrecked brig *Levi Stevens* by the United States district court for the district of California in a suit for wages brought against said owners by the crew of the said vessel, the ground of the claim being that nearly the whole of the amount of the wages recovered had, at the time of suit brought, been already paid by the master of the said vessel to the United States consul at Apia, and by him applied to what he claimed to be due for clothing furnished the crew of the wrecked vessel.

The *Levi Stevens* was wrecked in the South Pacific Ocean in November, 1885, on the Suwarrow Reef. The crew succeeded in landing on the island of Suwarrow, where they remained until the following March, when they took shipping for Apia, in the island of Samoa, where they arrived in the following month of April.

The United States consul at Apia, Mr. Greenbaum, attended to their wants, supplying them with the necessary clothing, amongst other things, and upon learning that wages were due them he applied to the master to pay for the clothing furnished out of the wages due. This the master did as to all of the crew except one, but without their assent, he borrowing the necessary money on the credit of the owners of the wrecked vessel.

It is found as a fact in the said case by the district court (23) that the consul, when asked by the crew who was to pay for the clothing furnished, replied, "the United States;" and also that the consul, at the time he furnished the clothing, had no information that wages were due the crew.

It was urged by the owners of the wrecked vessel, in defense to the case made by the libellants, that the payment by the master in obedience to the consul's direction or demand was, to that extent, a lawful discharge of the amount claimed in the libel.

But the district court did not consider the defense of payment a valid one, and, proceeding on the ground that the case fell within section 4577, Revised Statutes, held that the crew were "destitute" in the sense of said section, and so entitled to have their necessities supplied and to be sent home at the expense of the United States, and decreed accordingly for the several amounts claimed.

It is upon this state of facts, presented considerably more in detail, that Mr. Peterson's claim rests.

In my opinion he has no valid demand against the United States for the money paid by the master of the unfortunate vessel to consul Greenbaum.

Section 1697, Revised Statutes, provides that every consul shall, before receiving his commission, give a bond with such sureties as the secretary of state shall approve "for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person to his use as...consul... under any law now or hereafter enacted; and for the true and faithful performance of all other duties now or hereafter lawfully imposed upon him as...consul..." And the bond so required "shall be deposited with the treasury."

Section 1735, Revised Statutes, provides as follows: "Whenever any consular officer willfully neglects or omits to perform seasonably any duty imposed upon him by law, or by any order or instruction made or given in pursuance of law, or is guilty of any willful malfeasance or abuse of power, or of any corrupt conduct in his office, he shall be liable to all persons injured by any such neglect or omission, malfeasance, abuse, (24) or corrupt conduct, for all damages occasioned thereby; and for all such damages he and his sureties upon his official bond shall be responsible thereon to the full amount of the penalty thereof, to be sued in the name of the United States for the use of the person injured. Such suit, however, shall in no case prejudice, but shall be held in entire subordination to the interests, claims, and demands of the United States, as against any officer under such

bond, for every willful act of malfeasance or corrupt conduct in his office."

Section 1736, Revised Statutes, provides as follows: "If any consul or commercial agent neglects or omits to perform seasonably the duties imposed upon him by the laws regulating the shipment and discharge of seamen and the reclamation of deserters on board or from vessels in foreign ports, or is guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office he shall be punishable by imprisonment for not more than one year and by a fine of not more than ten thousand dollars and not less than one thousand."

It thus appears that congress has addressed itself with some care to the subject of providing security against the unfaithfulness of persons holding consular offices, and we are not at liberty to say that the provision thus made is not entirely adequate.

It can not be doubted that this legislation was the result of the well-settled principle that the United States is not liable to its citizens for the consequences of the wrongs or shortcomings of its officers. "No government," says Mr. Justice Miller in *Gibbons v. United States* (8 Wall., 269, 274), "has ever held itself liable to individuals for the malfeasance, laches, or unauthorized exercise of power by its officers and agents." The same doctrine has been often laid down by the same court (*Minturn* v. *United States,* 106 U. S., 437; *United States* v. *Kirkpatrick,* 9 Wh., 720; *United States v. Van Zandt,* 11 *Ib.,* 184; *Dox* v. *Postmaster-General,* 1 Pet., 318).

It is thus very clear that if the claimant, Peterson, has any remedy it is against the consul and the sureties on his bond, and not by any possibility against the United States. This would seem to dispose of the case.

(25) It might be considered as hardly proper if I were to go further and indicate an opinion on the abstract question as to the meaning of the word "destitute" as used in section 4577, Revised Statutes, in view of the conflict in that particular between the department of state and the United States district court for the district of California. The question is a judicial one, and should be settled, it would seem, by the courts, At the same time, if it were before me as a practical question, I should dispose of it as any other question.

Very respectfully,

A. H. GARLAND.

The Secretary of State.

Vol. XIX, p. 196 (Garland)

OFFICIAL CONSULAR SERVICES

Under the laws and usages governing the American consular service, the authentication, noting etc., of marine protests are to be regarded as official consular services.

Department of Justice,
November 22, 1888.

Sir: By your letter of the 25th of October, 1888, you inquire, as I understand your communication, whether "the natural and essential character of the consular services of authenticating, noting, etc., marine protests, apart from the factitious status given them by inclusion in the tariff of official fees," are or are not official consular services?

The office of consul is of very ancient origin. In its early history its incumbent was a municipal officer, intrusted with the power and charged with the general duty of the enforcement of the laws of the sovereignty which he represented over its citizens resident in a special locality or municipality, out-(197)side of the general territorial jurisdiction of the sovereign. Within the governments of Christendom, the exterritorial jurisdiction of a foreign sovereignty over its citizens has generally ceased to exist, and the local law governs the residents as well as the citizens of a nation. But outside of the pale of Christendom, in some instances the exterritorial jurisdiction of the sovereignty still exists, and the corresponding powers and duties of the consul still survive. Under international law there have been and are, therefore, different official duties incident to the office of consul, varying with time, place, and circumstances. No invariable test can be derived from international law, or from the general character of the consular office, by which to determine what services performed by the consul are official consular services, and what are not. The American consul has no authority except what may be expressly granted by a law of congress, and acknowledged by the government in whose jurisdiction he resides. His duties are described in different acts of congress, and in the consular instructions of the department of state. (Warden's Consular Establishment, page 140.)

"In process of time, by traditional usage, by positive provisions of local law, and by treaty stipulations, the existing legal character with its limited rights was fixed on the foreign consuls mutually accredited in the countries of Christian Europe and America." (7 Opin., 348.)

Whether the taking of marine protests is an official consular ser-

vice, or a non-consular service, must be determined by tradition, usage, treaties, and laws. The second section of the act of the 14th of April, 1792 (1 Stat., 255), provides:

"And for the direction of the consuls and vice-consuls of the United States in certain cases.

"Sec. 2. *Be it enacted by the authority aforesaid.* That they shall have the right, in the ports or places to which they are or may be severally appointed, of receiving the *protests or declarations* which such captains, masters, crews, passengers, and merchants, as are citizens of the United States, may respectively choose to make there."

By the twenty-second section of the act of the 1st of March, 1855 (10 Stat., 626,) it is provided:

"That the following record books shall be provided for and (198) kept in each consulate and commercial agency,...a book for the entry of *protests*, and in which all *other* official consular acts likewise shall be recorded."

In an opinion rendered on the 2d of June, 1855 (7 Opin., 259), Attorney-General Cushing, in classifying and distinguishing between consular and non-consular services, applying the act last referred to, concludes:

"(4) Drawing out a power of attorney, bottomry bond, will, or any such similar service, is a notarial, not a consular act; and therefore only the certificate upon it would go to the account of the government.

"(5) I should have said the same of extending a protest, but for the phrase in another part of the act, 'a book for the entry of protests, and in which all other official consular acts likewise shall be recorded,' which seems to cover the fact of extending a protest, and so to give the fee to the government."

In determining what are the usage and law on this subject section 1745 of the Revised Statutes can not well be omitted. It provides: "The president is authorized to prescribe from time to time the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services besides such as are expressly declared by law in the business of the several legations, consulates, and commercial agencies."

This section authorizes the president to prescribe a tariff of fees for official services only, and does not authorize him to fix the rate for non-official. It also empowers him to designate or name what shall be regarded as official services beside such as are expressly declared by law. When thus empowered, if he shall name or designate in the tariff of fees as official that which before had not been so regarded, from the time of such naming or designation the services thus desig-

nated should be regarded as official. Your communication shows that the president has prescribed a rate of fees under the section, and that he has therein named such marine protests as are referred to in yours. I therefore conclude from the usage, as shown from the laws of the past (some of which have been repealed) and those of the present, (199) that the "authenticating, noting," etc., of "marine protests," concerning which you enquire, are official consular services.

Very respectfully,

A. H. GARLAND.

The Secretary of State.

Vol. XIX, p. 225 (Garland)

CONSULAR FEES

A certified consular invoice is required by law for the admission to entry of imported merchandise not subject to duty, excepting where congress has expressly dispensed with that requirement.

The new addition of the consular regulations of 1888 contains provisions making the fee for a consular certificate to an invoice of merchandise not subject to duty official and returnable to the treasury.

The fee for such certificate may be rendered official by executive order, and specially included in the tariff of official fees under the Revised Statutes.

Department of Justice,
January 22, 1889.

Sir: Yours of the 21st ultimo and of the 3d instant, with inclosure, have been received, and in them you request an official opinion upon three propositions touching the subject of consular fees, which have arisen by reason of a recent decision of the United States court of claims in the claim of John S. Mosby, the former consul at Hong-Kong, China.

Attorney-General Cushing had occasion, in 1855, to write an excellent opinion upon this and other subjects relating to the consular service, in which he construed the act of March (226) 1, 1855, (10 Stat., 623; 7 Opin., 243). This act was, however, wholly repealed by the act of August 18, 1856. (11 Stat., 65.)

The important and material sections of the latter act were transferred to and are now embraced in the several chapters of Title XVIII of the Revised Statutes.

The questions presented for consideration bear directly upon the commercial relations of the United States with foreign governments or their subjects, and the provisions of law above referred to must necessarily, therefore, be considered in connection with the laws regulating the importation of goods, whether free or dutiable, into the United States.

With this preliminary and casual reference to the law by which your propositions will be governed, I shall now answer your questions in their order.

"The court hold that the certificate to an invoice of merchandise not subject to duty is a non-official paper; that the consular regulations of 1874 and 1881 contain no provisions making the consular charge for such a certificate an official fee; but they intimate that the president may, in his discretion, prescribe fees for non-official acts, and thereby render such fees official. This leads to the inquiry whether the new edition of the consular regulations, formulated by the president in February, 1888, to go into effect April 1, 1888, contain any provision by virtue of which the fee for a consular certificate to an invoice of merchandise not subject to duty is made official and returnable to the treasury. The paragraphs touching official fees and invoices are 491-508, and 636-682."

Merchandise shipped to the United States in transit to a foreign country, as indicated by manifests, bills of lading, or other documents, are not importations into the United States under the law, and consular invoices are not required.

Strictly speaking, therefore, importations under the statutes consist of goods that are dutiable and goods that are admitted free. There is no controversy as to the requirements of an invoice and the character of the consular fee in regard to dutiable importations. It will be observed that the law upon the subject of consular invoices is found in the statutes regulating the customs duties.

The answer, therefore, to the material part of the above (227) question depends upon the construction or application of the provisions of section 1 of the act of March 3, 1863 (12 Stat., 737) and of section 1 of the act of June 22, 1874, (18 Stat., pt. 3, p. 187.) The provisions of section 1 of the act of March 3, 1863, have been reenacted in sections 2853, 2855, and 2860, of the Revised Statutes; but no part of the act of June 22, 1874, has been embraced in the Revised Statutes. It may be found, however, in volume 1 of the supplement to the Revised Statutes, page 79.

These statutes are now in full force, and in effect they are prohibitory. No distinction is made in them between dutiable and free goods. Whether the goods belong to the one or the other class, they are alike importations. Nor are free importations included in the exceptions under which merchandise may be admitted to entry without the invoices required by these statutes, although some exceptions are expressly made. The law-makers have not included free goods within the exceptions, and they can not be admitted to entry without the consular invoice required, unless the strict and familiar rule of

construction of statutes is relaxed for the purpose. This can not be done.

The first section of the act of March 3, 1863, expressly prohibits the admission to entry of goods unless the consular invoice accompanies them. Section 9 of the act of June 22, 1874, provides, "that except in the case of personal effects accompanying the passenger, no importation exceeding one hundred dollars, in dutiable value, shall be admitted to entry without the production of a duly certified invoice thereof as required by law."……

The state and treasury departments, which have cognizance of these matters, have, according to the information transmitted by you, construed the above statutes to mean that "the fact that imported goods are entitled to free entry does not excuse the production of a certified invoice." And in 1872 the question arose, and the secretary of the treasury on the 8th of November in that year so decided, and notified the collector of customs at San Francisco, Cal., by letter of such decision.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most (228) respectful consideration, and ought not to be overruled without cogent reasons (*Edwards* vs. *Darby,* 12 Wheat. 210; *United States* vs. *The State Bank of North Carolina,* 6 Pet., 29; *United States* vs. *McDaniel,* 7 *ib.,* 1). The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draughtsmen of the laws they are afterwards called upon to interpret." (*United States* vs. *Moor,* 95 U. S. R., 763.)

And the above rule of contemporaneous construction of statutes, by those charged with their execution, applies in all cases of ambiguity and doubt. (*Swift Co.* vs. *United States,* 105 U. S. R., 695, and the cases therein cited; *United States* vs. *Philbrick,* 120 U. S. R. 52; *United States* vs. *Hill, ib.,* 169.)

It is not necessary to discuss the reasons why certified consular invoices should or should not be required for free importations, inasmuch as the conclusion has been reached, as will be perceived from the above remarks, that such invoices are required by law.

The president may, therefore, in his discretion, prescribe the fee for a consular certificate to an invoice of merchandise not subject to duty as official and require it to be returned to the treasury. And even if those certified invoices were not required by law, the president is authorized in his discretion, under section 1745 of the Revised Statutes, to designate the service of the consul in certifying such invoices as official, and also to declare the fee prescribed therefor to be official, and require it to be accounted for to the treasury.

Upon my first examination of the paragraphs of the consular regulations of 1888, referred to in your communication, I was under the impression that item 36 of paragraph 508 included a special reference to the section of the Revised Statutes in which invoices for dutiable goods are required and the fee prescribed. But, upon further investigation and reflection, I find this impression to be erroneous. Item 36 of paragraph 508 is broad enough in its provisions to include the fee for a consular certificate to an invoice of merchandise not subject to duty, and to make such fee official and returnable to the treasury.

In answer to your second inquiry, I beg to say, that I see (229) no reason why the fee for certifying an invoice may not be rendered official by executive order and specially included in the tariff of fees in accordance with section 1745 of the Revised Statutes.

The answers to your first and second inquiries render it unnecessary for me to express an opinion upon the third proposition submitted.

I am of the opinion therefore—

(a) That a certified consular invoice is required by law for the admission to entry into the United States of goods and merchandise not subject to duty, except in the instance in which congress has expressly dispensed with the requirement of the same.

(b) That the new edition of the consular regulations of 1888 contains provisions which make the fee for consular certificate to an invoice of merchandise not subject to duty official and returnable to the treasury.

I am also of the opinion that the fee for certificates to consular invoices may be rendered official by executive order, and specially included in the tariff of official fees under the Revised Statutes.

Very respectfully,

A. H. GARLAND.

The Secretary of State.

Vol. XX, p. 26 (Taft)

SEALED CARS

Department of Justice,
February 13, 1891.

(31) Extract) 3. The third question is whether or not the law referred to, or any other, requires that officers of the United States shall be stationed on contiguous foreign territory for the purpose of sealing cars into which may be placed merchandise

destined for ports within our territory. Section 2 of the act of 1864 evidently contemplates the presence in the contigu- (32) ous country of some officers authorized to seal cars. By the third section the secretary is required to make regulations for the sealing of cars by such officers. The sealing of a car is not very different from other duties of a commercial character which have been imposed upon consular officers of the United States from the foundation of the government. It is reasonable, therefore, to suppose that congress intended that the duty here referred to should be performed by consular officers. Such has been the construction of the act since its passage. There is therefore an implied obligation upon the secretary to authorize such officers to seal cars and vessels under the act in question. There is no provisions of law, however, requiring the secretary of the treasury to appoint inspectors for the sole purpose of sealing cars and vessels in the contiguous countries, and there is no appropriation out of which such inspectors could be paid. The seventh section of the smuggling act empowers the secretary to appoint additional inspectors in certain revenue districts of the United States, but nothing is said of inspectors stationed in foreign countries. Section 2999 authorizes the appointment of special agents of the treasury to reside in foreign countries through which bonded goods are carried from the warehouse of one collection district of the United States on the Atlantic coast to that of another on the Pacific coast, and *vice versa*, for the purpose of supervising the transportation of such goods through the foreign country and preventing fraud upon the government. This section was enacted in 1854, and was evidently directed to the carriage of goods over the Isthmus of Panama. It cannot in any view apply to the case in hand.

Section 2 was an exception to the operation of section 1 of the smuggling act of 1864. It was doubtless supposed by congress that the bulk of importations would be made under section 1 of the act, and that the exceptional cases under section 2 could be properly attended to by the consular officers, and the government thereby protected from fraud. If it now turns out that the importations in the manner provided in section 2 are so great that consular officers are not fitted, or have not the opportunity by reason of their other duties, to so examine the goods and seal the cars as to prevent fraud, the secretary of the treasury has no authority by (33) law, and therefore is not required, to appoint new officers especially charged with the duty. This result may be a reason for congressional action granting such authority, but until it is granted consular officers must continue to do the sealing.

The only way now open to the secretary of preventing the evils

which have proved necessarily incident to the system of sealing cars in accordance with section 2 of the act of 1864, under the present regulations, is to modify the regulations, by directing that an examination of some kind be had upon the frontier.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The Acting Secretary of the Treasury,
Approved: WM. H. H. MILLER.

PERSONS IN CHARGE OF CONSULAR OFFICES

A person placed in charge of a consular office by the incumbent of the consulate, but without appointment and qualification as prescribed by the constitution and laws of the United States, cannot lawfully perform the regular official duties of the post, nor should he be permitted to perform those other unofficial services, such as notarial services, which a consul is not required by law to perform, but the chief value of which depends entirely on the fact that the person rendering them is a consular officer.

Department of Justice,
May 7, 1891.

Sir: Your communication of January 15, ultimo, earlier attention to which has been unavoidably delayed, requests an opinion upon the question whether a person placed in charge of a consular office by the incumbent of the consulate to which the office belongs, but "without appointment and qualification as prescribed by the constitution and laws of the United States" can perform (1) the regular official duties of the post, and (2) notarial and other unofficial services."

I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person cannot possibly have any virtue in him as a public officer. This disposes of the first branch of your question.

The second branch refers to that class of functions which are performed customarily by consuls, but which are entirely unofficial, being neither required to be done by the law nor by executive regulations. (*United States v. Mosby,* 133 U. S., 273.)

The value of *such* services depends entirely on the fact that the person rendering them is a consular officer. It may be that the laws of a state of the United States give validity to certain services of that kind, as, for example, taking (93) acknowledgments abroad of conveyances of land in such state, or it may be that the efficiency of the act

is due to the faith generally reposed in consular officers. However that may be, the United States would seem to be in duty bound to protect the public, as far as it may be reasonably expected to do so, against the exercise of even merely voluntary consular functions by persons not regularly appointed consuls. It, therefore, clearly concerns the United States that no person shall be permitted to exercise the office of consul of the United States in any way who has not been authorized by congress to do so. This disposes of the second branch.

Very respectfully, yours,

W. H. H. MILLER.

The Secretary of State.

Vol. XX, p. 455 (Miller)

NOTARY

Department of Justice,
August 25, 1892.

(458) (Extract) It is clear that the applications to which you refer, and which are illustrated by the communications of Consul-General Goldschmidt and Mr. Jentzsch, viz, those that are (459) signed, or signed and sworn to, in blank, and afterwards filled in, and those which bear merely a certificate of the signing, but no applicant's oath or affidavit, furnish no sufficient ground for official action in the patent office.

The practices referred to relates to administrative matters within the purview of your department, and are such as may well be called to the attention of congress, but they are not such as now require an official opinion from me.

In conclusion, it is my opinion that a notary of Austria-Hungary, who is not authorized by the laws of his country to administer oaths or take affidavits, lacks the requisite authority to administer the oath required by section 4892 of the Revised Statutes.

Very respectfully,

W. H. H. MILLER.

The Secretary of the Interior.

Vol. XXI, p. 201 (Harmon)

CONSUL—ATTORNEY-GENERAL

When a consul intervenes in a controversy between master and seamen, by mutual consent of the disputants, he acts as an arbitrator and not as consul.

The attorney-general can not be called upon for an opinion unless specific

questions of law are formulated which relate to an existing question calling for the action of the department requesting it.

(202) Department of Justice,
July 26, 1895.

Sir: I have your letter of July 24, 1895, inclosing a statement of the United States consul at Havre that the steam yacht *Barraconta*, a foreign-built vessel, owned by a citizen of the United States and unregistered, arrived at that port from the Mediterranean, destination, foreign ports, and that he had intervened on account of disputes and differences that had arisen between the master and first officer on the one side and the chief engineer and cook on the other side.

You request "an opinion upon the facts presented" in the communication from the consul.

You further state: "I should have no hesitation in approving the action of the consul at Havre if the yacht in question were a registered American vessel, but I am unwilling to assume the responsibility of determining the legal status of a foreign-built yacht."

It is not entirely clear to me upon what points you wish an opinion.

It is against the settled practice of this department to give an opinion upon a general statement of facts without a specification presenting special questions of law. (14 Opin., 367; 20 Opin., 259, 493, 699, 711, 723.)

The attorney-general can not properly give an opinion where it does not appear that some question exists calling for the actions of the department requesting it. (20 Opin., 383, 420, 465, 618.)

It appears from the consul's statement that what he did was "by mutual consent of master and seamen." It would seem from this that he had exercised no consular authority, and that he in effect acted as arbitrator by consent of parties, and therefore it is not apparent to me that any question arising out of his action is now pending in the administration of your department.

If there be no question pending in your department requiring official action necessarily involving a determination of "the legal status of a foreign-built yacht," I would not be warranted in giving to you an opinion upon that subject.

If, in the administration of your department, any action is necessary in respect of what the consul has done in this case, I request that you will formulate specific questions of law upon which you wish to have my opinion.

Very respectfully,
JUDSON HARMON.

The Secretary of State.

Vol. XXII, p. 32 (Richards)

DAMAGES—ILLEGAL—IMPRISONMENT

Department of Justice,
February 7, 1898.

(Extract) Sir: On January 4, 1886, a citizen of the United States, Mr. Thomas J. Culliton, the treasurer of the dredging company then doing work on the Isthmus of Panama, was arrested (33) and imprisoned by the acting perfect of Colon without judicial process and without any allegation of a violation of law, but simply because Mr. Culliton's conduct was alleged by the prefect to be in disrespect of his authority. The United States consul at Colon and Admiral Jouett, who happened to be in port at that time, intervened, and Cullion was released by the order of the prefect after five hours dention in the common jail. The statement of this outrage contained in the protest filed by Mr. Culliton with our consul at Colon, April 6, 1886, is as follows:

* * * * * * * * * *

Very respectfully,
JOHN K. RICHARDS,
Solicitor-General.

Approved: JOHN W. GRIGGS.

The Secretary of State.

Vol. XXII, p. 72 (Griggs)

ENTRY AND RETURN CERTIFICATES OF CHINESE

The original entry certificates of Chinese merchants and others exempted must be issued by their government or the government where they last reside.

The return certificate of Chinese persons entitled to return to the United States under the contingency contemplated by article II of the treaty of 1894 with China must be accompanied by a certificate as to the facts, made by the Chinese consul at the port of departure.

Certificates issued to Chinese persons of the exempted class by the Chinese consul at Havana in the absence of certification by a consular officer of the United States should not be accepted by the customs officials of the United States.

The return entry of such Chinese is allowed only on strict compliance with the terms of the treaty and the regulations formed thereunder.

The terms upon which the representation of the interests of the United States at Havana was committed or intrusted to the British consul during the existing war with Spain were informal and did not specially include the service of viséing certificates to be issued to Chinese persons.

Chinese certificates viséed by the British consul at Havana during the absence

of the United States consular officers may be accepted by the authorities of the United States, provided this duty is voluntarily performed by such officer with the consent of the British government.

Department of Justice,
May 6, 1898.

Sir: I have the honor to acknowledge the receipt of your communication of May 2, relative to certain correspondence passing between the department of state and the Chinese minister at this capital, copies of which have been transmitted to your department, in the course of which inquiry was made by the Chinese minister as to whether certain Chinese certificates, viséed by the British consul at Havana during the absence from Havana of the consular officers of the United States, would be accepted by the proper authorities of the United States. You inform me, further, that the collector of customs at New York has requested instructions from you as to the acceptance of certificates issued to Chinese persons of the exempt class by the Chinese consul at Havana but without certification by the consular officer of the United States, and whether in case it shall be decided that such certificates should not be accepted, certificates viséed by the British consul at Havana should be regarded (73) as sufficient evidence to entitle the holders to admission to this country, and in view of the above facts and the condition of affairs now existing, you request my opinion as to your authority to direct the acceptance of certificates viséed by the British consul at Havana, to whom, it is understood, the consul-general of the United States turned over all matters affecting American interests prior to his recent departure from that city.

The certificates in question here may be, so far as the statement of the facts discloses, the "original entry certificates" of merchants and the other classes of Chinese subjects referred to in section 6 of the act of May 6, 1882 (as amended by the act of July 5, 1884), and in article III of the convention between the United States and China, proclaimed December 8, 1894; or they may be the "return certificates" of Chinese laborers provided for in article II of said treaty. The question obviously does not refer to the "residence certificates" required of Chinese laborers and allowed to Chinese persons other than laborers by the act of May 5, 1892 (as amended by the act of November 3, 1893), although such residence or registration certificates are the basis under the treasury regulations of the return certificates to which certain Chinese laborers, under the treaty of 1894, are entitled. It appears, further, that Chinese merchants formerly engaged in business in this country are not required to take out a return certificate for use upon application for re-entrance, but shall

establish their former status as merchants here by the testimony of two creditable witnesses other than Chinese (sec. 2, act of 1893, *supra*); and the original entry of Chinese laborers is now absolutely prohibited by the act of 1882, as amended, the act of 1892, and the treaty of 1894, and their return entry is allowed only upon the strict compliance with the terms of the said treaty and the regulations framed thereunder (21 Op., 424). The certificates referred to in your queries may therefore embrace the original entry certificates of merchants and other exempt classes and the return certificates of laborers under the treaty.

Your request does not impose upon me the duty of considering the terms and requirements on which the respective (74) certificates may be granted or accepted by the customs officials under the Chinese exclusion acts, the treaty of 1894, the regulations of the state department and of your department, and the rulings and decisions upon the subject, except so far as to state generally that the original entry certificates of merchants and others exempt must be issued by their government or the government where they last resided, and the return certificates of the laborers entitled to return must, in the contingency contemplated by Article II of the treaty of 1894, be accompanied by a certificate as to the facts made by the Chinese consul at the port of departure for return to the United States. Moreover, it may be noted, that the laws and regulations require that the customs officials, in making the return certificates based on the registration certificate, shall make a thorough examination of the facts and of the accuracy of the applicant's statements, and that the diplomatic or consular representatives of the United States, before indorsing certificates submitted to them, shall examine into the truth of the statements set forth therein, and if the statements are untrue they shall refuse to indorse the certificate. It is quite clear from the language of section 6 of the act of 1882, as amended—which is to be read in connection with articles II and III of the treaty of 1894—that the respective certificates embraced in this enquiry should be indorsed or viséed by the diplomatic consular representatives of the United States in the foreign country from which the certificate issues, or at the port or place from which the person named therein is about to depart.

I am therefore of the opinion that certificates issued to Chinese persons of the exempt classes by the Chinese consul at Havana, but without certification by a consular officer of the United States, should not be accepted by the customs officials.

We thus come to the last question in the case, namely, whether certificates viséed by the British consul at Havana, assuming that all the other requirements of the law have been complied with, should be

regarded as sufficient evidence to entitle the holders to admission to this country, and this question will be answered by the answer to the (75) question, To what extent is the British consul at Havana a consular officer of the United States?

By the comity existing between friendly nations and under diplomatic practice, governments, at the request of friendly powers, often give to their diplomatic and consular officers authority to take upon themselves, with the consent of the government within whose jurisdiction they reside, the function of representing such powers at places where the latter have no consular officers. The United States has understood this authority to be restricted to the extending of protection to the citizens or subjects of the friendly power and to the granting of the services and good offices of our representatives, with their own consent, to meet what has ordinarily been a fortuitous and temporary exigency of the friendly government. (United States Consular Regulations, 1896, p. 60, par. 174; p. 178, par. 453.)

However, an indication of the proper course to be pursued in this matter may be obtained from the laws relating to the verification or certification of invoices. The act of March 1, 1823 (3 Stat., 733), section 2844, Revised Statutes, expressly provides that such certification may be made in the absence of the consul or commercial agent of the United States by the consul of a friendly nation; or if there is no such consul in the country, by two merchants; and although the customs administrative act of June 10, 1890, provides for the authentication of invoices by the consul, vice-consul, or commercial agent of the United States of the proper consular district, it is to observe that section 29 of the latter act, repealing various prior provisions of law on the subject, does not repeal section 2844, although it repeals sections 2843 and 2845. While, therefore, the statutes relating to the granting of certificates to Chinese do not contain provisions similar to those in section 2844, it may be said that those statutes, so far as they authorize the granting of certain consular certificates to Chinese, were passed for the purpose of executing the treaties between the United States and China, and that it seems desirable, so far as consular action in such a matter is necessary, that the acts of the British consuls, as the representatives of American interests in the Spanish dominions during the existing war, should, so far (76) as possible, be accepted by our authorities, whether those consuls be considered as acting United States consuls or as British consuls acting for the United States. And the word "consul" is to be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice-consul-general, consul or vice-consul. (Sec. 4130, Rev. Stat.)

The request of the friendly power implies the granting of sufficient authority by it in the premises. But the functions should be accepted by the officer in question and the approval of his government should be signified. In the existing circumstances of the war with Spain the consent of its government would not be obtained, but may be implied in view of ordinary diplomatic practice, or may perhaps, for the purposes of the present inquiry, be ignored. The terms upon which the representation of the interests of the United States at Havana was committed or intrusted to the British consul at that city were informal and did not specifically include such service as is here contemplated. But while it may generally be the case that this friendly representation is confined to the extending of protection and good offices, I perceive no valid reason which forbids the British consul in question—consenting himself, and with the approval of his government—to perform such ordinary and routine duties of the United States consul as the indorsing or viséing of Chinese certificates; always providing that he acts in such case in accordance with the strict requirements of our law and the regulations thereunder.

I therefore answer your last inquiry, whether you may properly authorize the acceptance of the Chinese certificates in question under the visé of the British consul at Havana in the affirmative.

Very respectfully,

JOHN W. GRIGGS.

The Secretary of the Treasury.

Vol. XXII, p. 212 (Griggs)

SEAMEN—DISCHARGES

The master of an American steamship requested the discharge of a seaman, the latter joining in the request. The log book showed that on a certain day the sailor refused to work, alleging sickness, which proved to be intoxication, and the following day he was unable to work from consequent illness. For these reasons the master deducted from his wages four and eight days' pay, respectively. *Held*, The consul-general was justified in discharging the seaman.

The master of the vessel had no legal right to impose and collect the fines indicated, as the entries in the log book did not amount to satisfactory evidence of unlawful refusal or neglect to work when required.

If the seaman was discharged because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and in such cases the consul-general is authorized to exercise some reasonable discretion in determining this extra allowance, in reference to actual or anticipated ill treatment.

Department of Justice,
September 20, 1898.

Sir: I have the honor to acknowledge the receipt of your com-

munication of September 6, inclosing copy of a dispatch from the United States consul-general at Panama, and asking my opinion upon certain questions raised thereon.

It appears that on August 15, 1898, Capt. W. H. McLean, master of the American steamship *San José,* came before the consul-general requesting the discharge of John Dowd, a coal passer on said vessel, said Dowd appearing and joining in the request, which was granted. The captain then produced his log book, whereon were certain entries to the effect that on August 12 Dowd had refused to work, alleging sickness, which, on examination, proved to be intoxication, and that on the following day he again refused to work, being unable to do so from illness consequent on his condition the preceding day. For these offenses the master deducted from his wages four days' pay and eight days' pay, respectively, amounting in all to the sum of $14. While the discharge was desired by both master and seaman, the consul-general states that his principle reason for discharging the latter was the fact that he felt it would be unsafe to send the man back to the vessel owing to the evident ill will displayed by the master towards the seaman.

You ask me, first, whether the consul-general acted correctly in discharging the seaman.

(213) Section 4580 of the Revised Statutes, as amended by the act of June 26, 1884 (23 Stats., 53) provides that—

"Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman * * * is entitled to his discharge under any act of congress or according to the general principles or usages of maritime law, as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman."

A consular officer may discharge a seaman in case of desertion caused by unusual or cruel treatment (act of June 26, 1884, sec. 6); also when the seaman is unusually or cruelly treated without having deserted. (Consular Regulations, par. 211.) When insubordination or bad conduct are alleged, the grounds on which a seaman may be discharged are generally such as to amount to a disqualification and show him to be an unsafe or unfit person to have on board a vessel; and the consular officer must satisfy himself that good and substantial reasons exist for a discharge before granting the application. (Consular Regulations, par. 213.)

In this case the offenses charged against the seaman would hardly

have constituted sufficient grounds for his discharge without his consent. A seaman is not to be discharged for slight or venial offenses, nor for a single offense unless of a very aggravated character (The Superior, 22 Fed. Rep., 927; Cons. Reg. par. 213). If the seaman is charged with insubordination, it should satisfactorily appear that he is incorrigibly disobedient, and that he persists in such conduct (The T. F. Oakes, 36 Fed. Rep., 442). Here, however, the discharge was requested by the seaman as well as the master, and it was therefore proper to grant it if "according to the general principles or usages of maritime law as recognized in the United States" (Act of June 26, 1884, sec. 2). As above shown, a seaman may be discharged for unusual or cruel treatment, and while in the present case no cruel treatment is actually recorded, yet if the consul-general discharged Dowd for these reasons, or because he feared such (214) treatment might supervene, the seaman himself joining in the application, your first question must be answered in the affirmative.

You next inquire whether the master of the vessel has the legal right to impose and collect the fines above mentioned.

As shown by the master's log book, Dowd lost two days' work as a result of his intoxication and consequent illness, and was thereupon fined twelve days' pay or $14. Section 4528, Revised Statutes, provides that a seaman is not entitled to wages for any period during which he unlawfully refuses or neglects to work when required. In the absence of other authority permitting the imposition of such fines, your question must be answered in the negative. In my judgment the log-book entries do not amount to satisfactory evidence of unlawful refusal or neglect to work when required.

Your third inquiry is: Should extra wages have been collected?

By section 4600, Revised Statutes, as amended by the act of June 26, 1884, a seaman who has deserted on the ground of cruel or unusual treatment, and is discharged by the consular officer, is entitled to one month's pay, and this provision is construed to apply to seamen discharged for the same reason, but who have not deserted (Cons. Reg., par. 222). I am of the opinion that if Dowd was discharged by the consul-general because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and that some reasonable discretion is to be permitted to the consular authority in determining this extra allowance in reference to actual or anticipated ill-treatment and a discharge consequent thereon.

Very respectfully,

JOHN W. GRIGGS.

The Secretary of State.

Vol. XXIII, p. 93 (Griggs)

ADMINISTRATION—ALIEN LAW OF CUBA—TREATY OF PARIS

Under article IX of the treaty of Paris, 1898 (30 Stat., 1759), a Spaniard born in the peninsula, who died in Cuba before the expiration of one year from the ratification of that treaty, was, in contemplation of the treaty, a Spanish subject at the time of his death.

Article XI of that treaty obliges the United States to see that Spaniards in Cuba have the same rights to appear before Cuban courts and pursue the same course therein as citizens of Cuba, but it does not make it unlawful for the laws of that country to give them better methods of appearing and proceeding as aliens or Spanish subjects than those enjoyed by the citizens themselves. Consequently that article does not prevent article 44 of the alien law of Cuba from being applicable to the estate of Don Ramon Martí y Buguet, a native of Tarragona, Spain, and a Spanish subject, who died intestate at Baez, Santa Clara, Cuba, July 2, 1899.

Under article 44 of said alien law, foreign consuls were authorized to be the administrators and judges in charge of the business of settling estates and succession to property of aliens dying intestate in Cuba. This privilege having been denied the Spanish consul by the court of Santa Clara, that court was without jurisdiction to administer the estate of Don Ramon Martí y Buguet. To oust the consul altogether and proceed without him was to proceed without jurisdiction.

Department of Justice,
April 26, 1900.

Sir: I have the honor to acknowledge the receipt of the following request for an opinion.

War Department,
Washington, April 16, 1900.

Sir: I have the honor to present a matter arising in a court of Cuba which seems to involve an interpretation of the treaty of peace with Spain.

On July 2, 1899, one *Ramon Martí y Buguet,* a native of Tarragona, Spain, and a Spanish subject, died intestate at Baez, Santa Clara, Cuba, leaving an estate. The court of Santa Clara, having jurisdiction under Spanish law to administer upon estates of persons dying within its jurisdiction, assumed control of said estate and proceeded to administer thereon pursuant to Spanish law for the administration of estates of deceased natives of Cuba.

On the 15th of July, 1899, the Spanish consul at Cienfuegos, having learned of the death of Martí, addressed a letter to the judge at Santa Clara, requesting that his consulate be permitted to administer upon the estate of the deceased, pursuant to the provisions of article 44 of the alien law put in force in the island of Cuba while Spanish dominion prevailed therein.

The court refused to comply with the request of the Spanish con-

sul, and the estate was administered upon in accordance with the laws regulating the administration of estates of deceased natives of the island.

The Spanish minister at this capital calls the attention of the government of the United States to this matter and requests this government to annul the orders made regarding said estate by the judge of said court.

The questions thus presented appear to me to be:

1. Under the provisions of the treaty of peace between the United States and Spain (December 10, 1898), did the court of Santa Clara have exclusive jurisdiction to administer upon the estate of said Don Ramon Martí, deceased?

2. If the said Don Ramon Martí at the time of his death was a resident of Santa Clara, Cuba, did the Spanish consul (95) have the right to participate in the administration of said estate?

3. If the request of the Spanish consul to be allowed to participate in the administration of said estate was improperly refused by the court, did the court thereafter possess jurisdiction to administer upon said estate?

I have the honor to request that you will favor me with your opinion upon the matter above presented.

Very respectfully yours,

ELIHU ROOT,
Secretary of War.

The Attorney-General.

Note.—The original papers in the case are also inclosed, which please return with your reply.

1075 and inclosures 1, 3, 4, 5, 6, 7, and press copies.

The inclosures of your letter show the following order of the judge of Santa Clara, dated the 25th of July, 1899:

"As it appears that Don Ramon Martí y Buguet, a native of Tarragona, died on the 2d instant, in the precinct of Baez, belonging to this judicial district, without leaving any relatives or testamentary provisions, this court has ordered the proclamation of the intestacy. As it appears that, on the 15th instant, the Spanish consul at Cienfuegos addressed a communication to this court, stating that, having heard that the Spanish subject, Don Ramon Martí, had died intestate, he has appointed Don Benito Menduiña, under article 44 of the alien law in force, to draw up the inventory and to carry out all the other proceedings provided by said law. Considering: First, that there is no evidence to show that Don Ramon Martí had obtained the registration required by article 9 of the treaty of Paris, concluded

between Spain and the United States on the 10th December of last year, in order to retain his Spanish nationality, and (considering) that, until such registration is proved by record, he must be regarded as a native of Cuba, and, consequently, subject only and exclusively to the provisions of the law of civil procedure and the civil code now in force. Considering: that, even if the reason hereinbefore stated did not exist, the pro- (96) visions of the alien law cited by the Spanish consul at Cienfuegos would still not be applicable, because, under article 11 of the said treaty, Spaniards residing in territories over which Spain has ceded or abandoned her sovereignty, remain subject, in civil and criminal matters, to the jurisdiction of the country in which they reside, in accordance with the ordinary laws in force in such territories, and must appear and plead in the same manner as the citizens of the country in which they reside. In view of the articles of the treaty of Paris, it is declared that the intervention of the Spanish consul at Cienfuegos in these proceedings cannot be permitted, and it is ordered that he be notified of this decision by a courteous note."

An examination of Article IX of the treaty of Paris shows that Spaniards residing in the ceded or relinquished territories were to have a year within which to make up their minds whether to preserve, not acquire, Spanish nationality, and I think there is no doubt that a Spaniard, born in the peninsula, who died in Cuba before the expiration of that year, was, in the contemplation of the treaty, a Spanish subject at the time of his death.

Article XI of the treaty, relied upon by the judge, is, in the English copy, as follows:

"The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject, in matters civil as well as criminal, to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong."

The first part of this article treats of the position of Spanish residents when proceeded against in court: the latter provides implements for their use. The former subjects them as defendants to the tribunals, according to the ordinary laws which may regulate the competency of the tribunals (leyes comunes que regulen su competencia); the latter places at their disposal, though aliens, the right to appear before the tribunals (comparencia en juicio) according to (97) the same laws of procedure (forma) and carrying on the same course of pleading and practice (procedimientos), as citizens of the country.

In so placing at their disposal the free right to appear and proceed like citizens, I do not understand that the treaty intended to make it unlawful to give them better methods of appearing or proceeding, as alien parties or as Spanish residents, in addition to those of citizens. The provision was for their benefit—they were to be allowed, at least, the same "forma" and same "procedimientos" as citizens. On the other hand, there is still less reason to say that as defendants they could not be subjected to any laws regulating the jurisdiction of the courts except those concerning cases between citizens of the country. The first part of Article XI says nothing of citizens of the country. It says they shall be subject to the tribunals according to the ordinary, the usual laws (comunes) concerning their compentency or jurisdiction.

What is meant by ordinary or usual? It was usual in every one of the countries mentioned to have laws concerning aliens, laws which incidentally affected the competency of the courts. Article IX of the treaty alludes to these long-familiar laws and the possibility of the others to be enacted. Such as these, in my opinion, are not excluded by the word ordinary (común).

Spanish residents, at the time of the making of the treaty, were somewhat uneasy lest they should be persecuted, and desired to be guaranteed that a proper course of procedure would be followed in criminal and civil actions against them; but they expected to be aliens, subjects of a foreign sovereign, and to be treated by the laws as such. They desired to be subjected to the tribunals only as other aliens might be; to the ordinary tribunals acting without special authority directed against them.

Article 47 of the alien law, which denied any special fuero to aliens (not, as translated, "special right or privilege"), operated to confirm a transfer of aliens (extrajeros) in the provinces from the old fuero de extranjeria and other special fueros (e. g., of war and marine) to the same courts to (98) which Spaniards were subject, "according to the cases," certainly without any purpose by so doing to make them cease to be aliens or to prevent the interposition in administrations of their respective consuls; and I think it was as little the intent of the provisions of Article XI of the treaty to exclude that interposition. The article forbids the establishment of the old fuero of aliens and that of a new fuero of Spaniards, but not all laws affecting the business concerning aliens, which may come into the ordinary courts of fueros "according to the cases." Such a treaty provision might even be unconstitutional and void.

The reasons given in 1868 and 1869 for the general abondonment of special fueros for the ordinary or common fuero were:

"In those regions (colonies), as in Spain, the diversity of fueros paralyzes the march of the administration of justice by the numerous jurisdictions (competencias) to which it gives rise, disorganizes the judicial hierarchy, renders impossible the formation of a correct and enlightened jurisprudence, and is the cause at times of contradictory judgments in identical cases, which diminishes respect for the law and for the tribunals."

I cannot suppose, without manifest proof, that the United States were stipulating to cripple permanently in Porto Rico and the Philippines, and (by persuasion) in Cuba, the vital power to make and judicially enforce laws concerning alien inhabitants.

It must be remembered that, so far as Cuba is concerned, this Article XI does not bear the same relation to the alien law as though the latter were an act of congress. The treaty is an agreement between Spain and the United States; supreme law for and over the latter, but not for and over Cuba. It obliges us, while acting in that country, to see to it that the Spaniards there are treated as the Article XI intends; but the alien law, while temporarily continued and enforced by the power of the United States, is rather the law of and for another country. It is an old law in Cuba, and is doubtless intended to be left in Cuba when we and our treaty are gone.

In my opinion, then, there is no reason to say that Article (99) XI of our treaty prevents article 44 of the alien law of Cuba from being applicable to the estate of Don Ramon Martí y Buguet.

Both of the conclusions of the court at Santa Clara, therefore, as I think, proceeded from erroneous views of the treaty of 1898.

Your third question is:

"If the request of the Spanish consul to be allowed to participate in the administration of said estate was improperly refused by the court, did the court thereafter possess jurisdiction to administer upon said estate?"

At first view this seemed to me a question so exclusively of Spanish civil law, with which the secretary of justice and the courts of Cuba are familiar, that I was disposed to suggest that it be referred to them for consideration, in the light of the views concerning the treaty hereinbefore set forth. But as I perceived from the inclosures of your letter that two secretaries of justice and some local official attorneys in Cuba have had this matter under consideration, and as I recognized that the international aspect of it might render it difficult for the question to be determined by the familiar rules of the Spanish law concerning appeals, proceedings in cassation, decisions between conflicting jurisdictions, etc., it seemed to me better to attempt to give a direct answer to your inquiry.

An examination of the original Spanish of the alien law, article 44 (of which you inclosed a translation), makes it clearer that the first paragraph of that article aims at the preservation of the property for the benefit of the heirs, rather than the exercise of the judicial power of Cuba in determining who may be the heirs or determining any other question concerning the estate.

Who, then, is expected by the alien law to determine such questions—the consul, the local judge, or both? If the consul is to have any judicial function in the matter, is he, with the local judge, to constitute a tribunal exercising the judicial power of Cuba; is he to exercise the judicial power of his own country and wholly exclude the local judge from judicial action, or is the consul to exercise the judicial power of his own country upon certain questions and to be the admin-(100)istrator as an officer of his own country, and the judge, with regard to other questions, to step in and exercise the judicial power of Cuba?

It seems to me that some light may be thrown upon these questions by articles 42, 43, and 45 of the alien law, articles 42 and 43 speaking (in the original Spanish) of demands giving rise to a special set of questions, and article 45 providing that in intestate proceedings the Spanish courts shall have jurisdiction only of those demands. In the translation of the alien law which you sent me the word "demands" is omitted from articles 42 and 43, and your translation of them, and of articles 44 and 45, is as follows:

"Art. 42. They shall also be subject to said laws and courts in all suits instituted by or against them for the fulfillment of obligations contracted within and outside of Spain in favor of Spaniards, or which involve the ownership or possession of property situated in Spanish territory.

"Art. 43. The Spanish tribunals shall also have jurisdiction over and shall take cognizance of suits between aliens brought before them, and which involve the fulfilment of obligations contracted or to be fulfilled in Spain.

"Art. 44. In the case of an alien dying intestate, the judicial authority of the town in which the death occurs shall, together with the nearest consul of the nation to which the deceased belonged, or with the person appointed by the consul in his stead, take an inventory of the property and goods and shall take the necessary steps to have the same placed under custody and at the disposal of the heirs.

"Should the alien be a resident, and should he die outside of his domicile, the judge of the latter, to whom notice shall be sent by the judge of the place where the death occured, shall fulfill the pro-

visions of the foregoing paragraph with regard to the property and effects of the deceased existing there.

"Should there be no consul in the town where the death occured or in the domicile, the judicial authority, while awaiting the arrival of the consul, whom he shall advise immediately, or of his delegate, shall only take the measures necessary for the custody of the property and of the goods.

"Art. 45. In intestate as well as in testamentary successions (101) of aliens, the Spanish courts shall have cognizance only of the claims and demands referred to in the foregoing articles."

Further light, I think, can be thrown upon the questions by an examination of two treaties, the making of which closely proceeded the alien law of 1870, one of Spain with Franch (A. D. 1862) and the other of Spain with Italy (A. D. 1867). I quote three articles, which are substantially the same in both treaties:

"XVII. In case of the decease of any subject of one of the contracting parties in the territory of the other, the local authorities must give immediate notice to the consul-general, consul, vice-consul, or consular agent in whose district the decease has occured, and they, on their part, must give the same notice to the local authorities when the decease comes to their knowledge first.

"If an Italian in Spain or a Spaniard in Italy should die without making a will or without appointing a testamentary executor; or if the legitimate or testamentary heirs should be minors, incapable, or absent, or if the testamentary executors appointed should be incapable, or should not be found in the place where the property has been left, the consuls-general, consuls, and consular agents of the deceased's nation shall have the right of proceeding successively to the following operations:

"1. To affix seals, ex officio or at the request of the parties interested, on all the movable property and papers of the deceased, giving notice of this operation to the competent local authority, who may be present and affix his own seals also.

"These seals, as well as those of the consular agent, must not be removed without the consent of the local authority. Nevertheless, if, after a notice addressed by the consul or vice-consul to the local authority, inviting him to be present at the removal of the double seals, he should not appear within forty-eight hours from the time of receiving the notice, the said agent may proceed to the operation by himself.

"2. To draw up the inventory of all the goods and effects of the deceased, in the presence of the local authority, if he has attended in consequence of the aforesaid notification.

(103) "The local authority shall put his signature to the reports drawn up in his presence, and shall have no right to demand fees of any kind for his official intervention in said matters.

"3. To provide for the sale at public auction of all the movable effects of the estate which may deteriorate and of those which may be difficult to preserve, as well as of the collections or effects for the disposal of which there may be favorable opportunities.

"4. To deposit in a secure place the effects and securities inventoried; to keep the amount of the debts and incomes received and the proceeds of the sales in the consular house, or to intrust them to some merchant who gives good security. In both cases he must proceed in concurrence with the local authority who has taken part in the previous operations, if, after the summons referred to in the following paragraph, subjects to the country, or of a third power, should represent themselves as interested in the estate.

"5. To announce the death which has taken place and to summon, by means of the newspapers of the place and of the deceased's country, such persons as may have claims against the estate, in order that they may send in their respective claims duly approved within the legal period of each country.

"If creditors of the estate should appear, their debts must be paid in fifteen days from the completion of the inventory, if there should be ready money enough for the purpose; and if not, as soon as the funds can be obtained in the most convenient manner, or within the period fixed by common consent between the consul and the majority of those interested. If the respective consuls should refuse payment of one or more of the claims brought in, alleging the insufficiency of the property of the estate to satisfy them, the creditors may, if they consider it advantageous to their interest, demand of the competent authority the power of constituting themselves as a body.

"Such a declaration having been obtained by the legal means established in each of the two nations, respectively, the consuls or vice-consuls must immediately consign to the judicial authority or to the syndics of bankruptcy, as the case may be, all the documents, effects and securities be-(103)longing to the estate; and the said agents will remain as the representatives of the heirs who are absent, minors or incapable.

"6. To administer and liquidate the estate, either themselves or through a person appointed on their responsibility, the local authorities having no power to interfere in these operations unless subjects of the country or of a third power should have to prove rights upon

the estate itself, and that in such case difficulties should arise chiefly proceeding from some claim which gives rise to discussion among the parties; the consuls-general, consuls, vice-consuls, or consular agents having no right to decide therein, it must be brought before the tribunals of the country, whose place it is to provide for and settle such difficulties.

"The said consular agents will then act as representatives of the estate; that is, they will retain the administrations and the right of definitely liquidating the inheritance, as well as that of proceeding to the sale of the effects in the periods before prescribed. They will take care of the interests of the heirs, with the power of appointing advocates to maintain their rights before the tribunals; and it is understood that they must furnish all the papers and documents necessary to explain the question which is submitted to their judgment.

"When the sentence has been pronounced, the consuls-general, consuls, vice-consuls, or consular agents must execute it, unless they interpose an appeal; and they will also continue of full right to carry on the liquidation which was suspended until judgment had been passed.

"7. To consign the inheritance or the produce thereof to the lawful heirs or to their agents, but not until the expiration of the term of six months from the date on which the announcement of the death was published in the newspapers.

"8. To constitute, whenever it may be necessary, a guardianship or trusteeship according to the laws of their own country.

"XVIII. If an Italian die in Spain or a Spaniard in Italy, at a place where there is no consular agent of his nation, the competent local authority shall proceed, in accordance with the laws of his country, to make an inventory of the effects (104) and to liquidate the property left, under the obligation of rendering an account as soon as it is possible of the results of his operations to the respective embassy or legation, or to the consulate or vice-consulate nearest to the place where the property has been left; but from the instant that the consular agent nearest to the place where the property has been left; makes his appearance, either in person or by means of any delegate, the intervention of the local authority must be in accordance with the provision in Article XVII of this convention.

"XIX. The consuls-general, consuls, vice-consuls, and consular agents of both nations shall attend exclusively to the inventories and other precautionary measures for the preservation of the hereditary property left by sailors of their nation dying ashore or on board

the vessels of their country, whether during the voyage or in the port of their arrival."

It is clear that under this treaty system between these three Latin countries—Spain, Italy and France—the consul is to exercise an extraterritorial judicial power and to be the real administrator of the estate; but that disputes in which the country where the death occured has some special interest, as where its own people or the people of a third country whom it should protect are concerned, are to be carved out of his jurisdiction and settled by the local judicial authority, leaving him to resume his functions when these special questions have been determined.

Similar treaties had anciently been made with England. Thus, in Warden's Consular Establishment, page 252, we read:

"In a treaty with Spain, made in 1667, it was stipulated, that the goods and estates of Englishmen, dying without will in that kingdom, were to be put into inventory, with their papers, writings, and books of accounts, by the consul or other public minister of the King of Great Britain, and placed in the hands of two or three merchants named by the said consul or public minister, to be kept for the proprietors or creditors; and that neither the Cruzada, nor any other judiatory whatsoever, should intermeddle therein; which, (105) also, in the like case was to be observed in England, toward the subjects of the King of Spain."

Still further light is shed upon our questions, I think, by the consular system of Spain, in which her consuls in foreign countries are authorized to exercise all the powers of courts of first instance, if permitted to do so by the laws of the country to which they are accredited.

I cannot but think, from these and similar considerations, that the privilege intended to be accorded to foreign consuls by article 44 of the alien law was not merely to be present and see that the local judicial authority did what was proper, nor to exercise any part of the judicial power of the country to which the consul was accredited, but to be the administrator and judge in charge of the business of settling the estate and succession.

It seems to me, therefore, that to oust the consul altogether, as was done in the matter of the estate of Don Ramon Martí y Buguet, and proceed without him, was to proceed without jurisdicion, and I herefore answer your third question in the negative.

Respectfully,

JOHN W. GRIGGS.

The Secretary of War.

Vol. XXIII, p. 112 (Griggs)

PORTO RICO—EXHORTO OR LETTER ROGATORY

Department of Justice,
May 7, 1900.

(114) Extract) In the courts of Great Britain a Spanish consul within his district was instructed, under the royal orders of Spain, to obtain the testimony of voluntary witnesses by proceedings before a magistrate, but to attend to citations himself. This was expressly upon the ground of the failure of English institutions to authorize the courts to take such proceedings, and was, when we consider that the Spanish consul is, so far as permitted by the local law, a judge of the peace and a judge of first instance, merely making use of a second Spanish court and not of a foreign court.

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Respectfully,
JOHN W. GRIGGS.

The Secretary of War.

Vol. XXIII, p. 400 (Griggs)

AMERICAN SEAMEN—FILIPINOS—CUBANS—PORTO RICANS

Seamen born in the Philippine Islands, being persons whose civil and political status is, by the treaty of peace with Spain (30 Stat., 1759), declared to be a matter for the future determination by congress, are not citizens of the United States within the meaning of any statute concerning seamen or any other statute or law of the United States.

The same thing is true, in a more obvious way, and with greater force, of Cuban seamen.

A Porto Rican engaged in the occupation of a seaman in the American merchant marine, including that of Porto Rico, is an American seaman within the meaning of the statutes relating to relief by consuls, in view of the provisions of sections 9 and 14 of the act of April 12, 1900 (31 Stat., 79), providing a civil government for Porto Rico.

All persons shipped in the United States on an American vessel have been, according to the practice of the government, treated as entitled to relief under the laws relating to seamen.

A place at which vessels of the United States receive their character as such, and where American shipping commissioners ship the crews of such vessels, is to be regarded as a place such that a person domiciled there and engaging in the occupation of a seaman or vessels of that character, is an American seaman within the intent of the provisions for the relief and protection, in foreign countries, of American seamen.

(401) Department of Justice,
February 19, 1901.

Sir: I have received your letters enclosing communications from the British ambassador at this capital and from the United States consul at Marseilles, concerning Filipino and other seamen.

You desire my opinion concerning the status of Filipino seamen on board British vessels arriving at the ports of the United States, in order that British consuls may know whether they may be discharged at such ports, and as to the status of Filipino, Porto Rican, and Cuban seamen, in order that our consuls abroad may know what treatment to accord them.

Cases recently argued in the supreme court of the United States and now under consideration there involve in some respects the question of the relations which Porto Rico and the Philippine Islands sustain to the United States; and may, possibly, in their decision call for some expression on the general subject of the civil status of the native inhabitants of those islands. I do not, therefore, deem it necessary or expedient to enter upon any general discussion of this subject in its constitutional aspect. In the argument addressed by me to the court on behalf of the government in the cases referred to, I discussed the subject at considerable length, asserting the principle that the treaty-making power, under the constitution, may acquire territory without admitting the inhabitants to the rights and status of citizens of the United States, and that by the treaty of Paris the native inhabitants of Porto Rico and the Philippine Islands were expressly intended to be left out of the pale of United States citizenship, and their civil status to be left to the future action of congress.

As to the native inhabitants of the Philippine Islands, no action has as yet been taken by congress, and therefore those people remain in the same condition, in this respect, as they were when the treaty was ratified.

The act for the temporary government of Porto Rico did not make the native inhabitants of that island citizens of the United States, but defined them to be citizens of Porto Rico.

It may be taken, therefore, as undisputed that the executive, the treaty-making, and the legislative branches of the (402) government, regard these native inhabitants, both as to Porto Rico and the Philippines, as not vested with the rights or admitted to the status of citizens of the United States in a domestic sense.

With the correctness of this view, and this course of executive and legislative action, I fully agree; and until that view is judicially declared to be erroneous, all official action by the executive departments should conform to the same course heretofore followed.

Referring, therefore, to the questions suggested by the British ambassador and our consul at Marseilles, I have to say:

1. That seamen born in the Philippine Islands, being persons whose civil and political status is by the treaty, which is the latest expression of the supreme law of the land, declared to be a matter for

future determination by congress, are not citizens of the United States within the meaning of any statutes concerning seamen or any other statute or law of the United States. That is to say, from the standpoint of our government they are not citizens of the United States in any sense. They are persons who are not subjects of any foreign power, and are, from an international standpoint, subjects of the United States, or, to use a term that has been suggested, "nationals." In a general way our government is responsible for them and to them; but whether a government chooses to relieve or support individuals who are seamen, or other individuals belonging in any way to the nation, is not a question of international law, but of municipal law, which every government makes to suit itself; and our laws make no provisions of that kind which are intended to apply to these Filipino seamen.

2. The same is true in a more obvious way and with perhaps greater force, if possible, of Cuban seamen.

3. In the case of Porto Rico, the situation is different. As to the Porto Ricans, congress has not been silent. It has passed an act establishing a government in the island, and in many ways affecting the rights and duties of the Porto Ricans and their relations with the United States. One section of the act declares (sec. 7):

"That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eight- (403) een hundred and ninety-nine, and then resident in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

The obvious intent of congress is to stop short of making the Porto Rican a citizen of the United States in the full sense of the phrase. But it does not necessarily follow that the extension to Porto Rico of the laws of the United States, provided for in section 14 of the organic act, was not intended to extend to Porto Rican seamen the statutes of the United States concerning the relief of American seamen. Those statutes contemplate citizens of the United States, or persons who have declared their intention to become such (R. S.,

2174), and foreigners domiciled in the United States, or shipped in an American vessel in a port of the United States, and presumed to be there domiciled, who act as seamen on American vessels. *Matthews v. Offley*, 3 Sumn., 115.

The fact of actual or presumed domicile seems to be regarded as effective, in the absence of full citizenship, to include a person within the intent of the statutes relating to the relief of American seamen. Other members of the crew of an American vessel, while part of the crew and on the vessel, are protected by and subject to those laws of the nation to which the vessel belongs, which it has a right to pass upon the legal theory that the vessel is a part of that nation's territory. But I do not understand that seamen who are actually members of the crew of an American vessel are now in question. I held, in an opinion of July 22, 1898, that vessels from Hawaiian ports were subject to the tonnage tax upon arrival at American ports after the cession of (404) Hawaii, on the ground that Hawaiian vessels, having been foreign vessels prior to the cession and when the statutes concerning the tonnage tax were passed, did not, by the mere fact of cession, cease to be within the purview of those statutes as foreign vessels. Applying the same principle, the Filipinos, having been foreigners when these statutes relating to the relief of American seamen were passed, and the treaty of Paris, instead of purporting to apply those statutes to them, having affirmatively declared that their civil rights and political status were reserved for future action by congress, cannot be regarded as within the intent of these statutes. Unquestionably they were not when the status was passed, and, equally clearly, the treaty did not intend to apply the statutes to them.

I am of the opinion, therefore, that these statutes do not apply to a Filipino domiciled in the Philippines, even when from on board an American vessel; but I am inclined to think that a Porto Rican engaged in the occupation of a seaman in the American merchant marine, including that of Porto Rico, is an American seaman within the meaning of the statutes relating to relief by consuls.

It appears from the consular regulations that hitherto those entitled to relief have included "foreigners regularly shipped in an American vessel in a port of the United States;" seamen who are citizens of the United States regularly shipped anywhere in an American vessel, those who have declared their intention to become citizens being treated as such citizens. Whether or not it was merely because of a presumption that a man shipped in a port of the United States was domiciled in the United States, the foreigner shipped in the United States seems to have long since acquired a settled status with regard to these relief statutes; so that all persons shipped in the

United States on an American vessel have been, according to the practice of the government, treated as entitled to relief.

This being the practice, congress, in the act creating a government for Porto Rico, may be regarded as having intended to make American seamen of Porto Ricans who in Porto Rico become a part of the American merchant marine. Section 14 of that act declares that the statutory laws of the (405) United States not locally inapplicable are to have "the same force and effect in Porto Rico as in the United States." That this included the laws concerning vessels of the United States, concerning shipping commissioners, and the shipping and discharge of seamen, is clearly to be inferred from section 9 of the same statute, both from what it says and from what it omits to say. That section provides that the Commissioner of Navigation shall make regulations "for the naturalization of all vessels owned by the inhabitants of Porto Rico on the eleventh day of April, eighteen hundred and ninety-nine, and which continue to be so owned up to the date of such nationalization, and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States.

Nothing is said of vessels subsequently owned by inhabitants of Porto Rico, nor is anything said about Porto Rican vessels engaged in foreign trade; but unquestionably it was not intended to nationalise vessels owned on a particular date and leave unnational, vessels that might thereafter be owned by inhabitants of Porto Rico, or to admit Porto Rican vessels to the specially privileged home trade and not to the foreign-going trade.

Section 14 was supposed to provide for all this.

Giving a liberal construction to the statute, I think it may be said that a place at which vessels of the United States were to receive their character as such, and where American shipping commissioners were to ship the crews of such vessels, was regarded as a place such that a person domiciled there, and engaged in the occupation of a seaman on vessels of that character, would be an American seaman within the intent of provisions for the relief and protection in foreign countries of American seamen.

Perhaps I should add that the good offices of our consuls can very properly be extended to the Filipinos and Cubans.

Very respectfully,

JOHN W. GRIGGS.

The Secretary of State.

Vol. XXIV, p. 69 (Knox)

GERMAN LETTERS ROGATORY—EXECUTION OF BY UNITED STATES COURT

Department of Justice,
June 9, 1902.

(70) (Extract) The usual practice in England and the United States has been to take testimony abroad by open commission issued from a court of record and directed to persons vested with no local judicial authority in the foreign country, who proceed as commissioners of the instance court to obtain voluntary testimony. (Wharton on the Conflict of Laws (1882), sec. 723 *et seq.*) This method was formerly the usual and the only regular mode of taking depositions in a foreign country. (*Stein* v. *Bowman*, 13 Pet., 209; *Froude* v. *Froude*, 1 *Hun.*, 76.) Letters rogatory or requistorial, drawn from the civil law, have obtained, as a rule, on the Continent of Europe, and are currently employed more frequently than at an earlier day. Under such letters, and by the doctrines of international law respecting comity, the courts of each country are held bound to execute commissions to take evidence, subject to the proviso that the requirement shall contain nothing to prejudice national sovereignty, and that reciprocity in such matters shall be assured.

It seems to be well settled that letters rogatory are issued only when an ordinary commission cannot be executed, that their use rests wholly upon comity between foreign states, that interrogatories are generally attached, and that the law of the forum to which the letters are addressed governs the procedure under them. (Whart. Conf. Laws, *ut supra; Nelson* v. *United States*, 1 Pet. C. C., 235; *Kuehling* v. *Leberman*, 9 Phila., 160; *Doubt* v. *Pittsburgh R. R. Co.*, 6 Pa. Dist. Rep., 238; sec. 4071, R. S.)

Section 875, Revised Statutes, provides for letters rogatory from United States courts in suits in which the United (71) States have an interest; and *per contra*, for letters rogatory addressed from a foreign court to a circuit court of the United States. And sections 4071-4074, Revised Statutes, provide for the taking of testimony in this country, to be used in foreign countries, in suits for the recovery of money or property in which the foreign government has an interest, either by commission or letters rogatory, under the authority and supervision of the district judge of the district where the witness resides. So that the United States has recognized by statutory provisions and judicially the principle of international comity involved.

The various states, either under statutes or pursuant to general doctrines, reciprocate with each other and with foreign countries in the same manner.

* * * * * * * * *

Very respectfully,

P. C. KNOX.

The Secretary of State.

Vol. XXIV, p. 116 (Hoyt)

GIFTS FROM FOREIGN PRINCE—OFFICER—CONSTITUTIONAL PROHIBITION

The provision of article 1, section 9, clause 9 of the constitution, which forbids the acceptance, without the consent of congress, by any person holding any office of profit or trust under the United States, of any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state, "applies as well to a titular prince as to a reigning one; and a simple remembrance of courtesy, even if merely a photograph, falls under the inclusion of "any present of any kind whatever."

(117) This prohibition expressly relates to official persons, and does not extend, under the circumstances outlined, to a department of the government or to governmental institutions.

Department of Justice,
September 8, 1902.

Sir: I have the honor to respond to your note of August 27, submitting for my consideration a copy of a note from the German embassy, which communicates a list of presents bestowed by Prince Henry of Prussia on the occasion of his recent visit to this country. You ask my opinion on the question whether the constitutional provision which forbids the acceptance, without the consent of congress, of any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state," may be construed as applying only to a reigning prince, in which case the authority of congress for the delivery of these presents would not be required. The presents consist of portraits given to the navy department, the military academy and the naval academy, and of a photograph to each of several military and civil officers of the United States. The provision of the constitution is as follows:

"No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." (Art. I, sec. 9, cl. 9.)

It is evident from the brief comments on this provision, and the

established practice in our diplomatic intercourse (2 Story on the Constitution, 4th ed., pp. 216, 217; 1 Wharton's Int.. Law Dig., sec. 110, p. 757), that its language has been viewed as particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based on our historic policies as a nation. Although it is manifest that the particular collocation of words in the constitution, like the words "any foreign prince or state" in the neutrality statutes, refers chiefly to a foreign government and its regular executive (cf. act January 31, 1881; 21 Stat., 604), it would not, in my judgment, be sound to hold that a titular prince, even if not a reigning potentate, is not included in the constitutional (118) prohibition. For the phrase of the provision is "*any* king, prince, or foreign state," and a titular prince, although not reigning, might have the function of bestowing an office or title of nobility or decoration, which would clearly fall under the prohibition. As this remark suggests generally the character of the gift, whether a present or some title of honor (although you do not suggest this point), it must be observed that even a simple remembrance of courtesy, which from motives of delicacy recognizes our policy, like the photographs in this case, falls under the inclusion of "any present * * * of any kind whatever." The act of 1881 (*supra*) which, it is true, refers only to a foreign *government*, uses the words "any present, decoration, *or other thing.*"

But as the constitutional prohibition expressly and exclusively relates to official *persons*, it could not properly be extended, under the circumstances at all events, in my judgment, to a department of the government and to governmental institutions.

I have the honor to answer your question in the negative.

Very respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The Secretary of State.

Vol. XXIV, p. 672 (Knox)

CONSULS—INSPECTION CARDS—UNOFFICIAL SERVICES

The president may prescribe a fee, as provided by section 1745, Revised Statutes, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the Quarantine Regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such.

No service by a consul can be unofficial when the applicant has a right to demand it and the consul no right to refuse it.

(673) Department of Justice,
June 11, 1903.

Sir: I have the honor to acknowledge the receipt of your communication of June 5, 1903, in which you ask for my opinion as to the authority of the president to decide that the service of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the quarantine regulations promulgated by the secretary of the treasury April 1, 1903, is unofficial, and to establish a fee for such services, likewise unofficial, and which may be retained by the consul.

The act of congress approved February 15, 1893 (27 Stat., 449), granting additional quarantine powers and imposing additional duties upon the marine-hospital service, among other things, provides:

"The secretary of the treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew; which shall be published and communicated to and enforced by the consular officers of the United States," (Sec. 3.)

"The secretary of the treasury shall from time to time issue to the consular officers of the United States and to the medical officers serving at any foreign port, and otherwise make publicly known, the rules and regulations made by him, to be used and complied with by vessels in foreign ports, for securing the best sanitary condition of such vessels, their cargoes, passengers, and crew, before their departure for any port in the United States, and in the course of the voyage; and all such other rules and regulations as shall be observed in the inspection of the same on the arrival thereof at any quarantine station at the port of destination, and for the disinfection and isolation of the same, and the treatment of cargo and persons on board, so as to prevent the introduction of cholera, yellow fever, or other contagious or infectious diseases; and it shall not be lawful for any vessel to enter said port to discharge its cargo, or land its passengers, except upon a certificate of the health (674) officer at such quarantine station certifying that said rules and regulations have in all respects been observed and complied with, as well on his part as on the part of the said vessel and its master, in respect to the same and to its cargo, passengers, and crew." (Sec. 5.)

Proceeding under the authority of the above-mentioned act, the secretary of the treasury, April 1, 1903, promulgated the quarantine laws and regulations now in force. These regulations specifically require that each steerage passenger shall be furnished with an inspec-

tion card of a particular kind, which shall be stamped by the consul or medical officer at the port of departure.

The duty to furnish such inspection card, properly stamped, has been imposed upon consuls by the congress, and is therefore official. The president may prescribe a fee for this official service, but no authority has been given him to declare such a fee unofficial and to permit the consul to retain the same as such.

Section 1745 of the Revised Statutes gives the president authority to prescribe what fees may be charged by consuls for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." This section does not, in my opinion, authorize the president to make unofficial any services, the duty to perform which has been imposed upon the consul by the congress. When the congress has directed a consul to perform any particular service without fixing a fee for the same, the president may prescribe a fee therefor. In such a case both the service and the fee would be official, and it would be necessary for the consul to account therefor, as provided by law.

The distinction between official and unofficial fees has been elaborately discussed in *United States* v. *Badeau* (33 Fed. Rep., 572; 31 Fed. Rep., 697); *Mosby* v. *United States* (24 Ct. Cls. R., 1); *United States* v. *Mosby* (133 U. S., 273). These opinions seem to make it entirely clear that every service, the duty to perform which has been imposed on a consul by law, is official, and that no service by such officer can be unofficial when the party desiring the same has the right to demand it and the consul no right to refuse to give (675) it. Certainly no consul, upon proper demand, could rightfully refuse to issue to a steerage passenger the inspection card provided for by the quarantine regulations when such passenger had complied with all necessary conditions.

Very respectfully,

P. C. KNOX.

The Secretary of State.

Vol. XXV, p. 77 (Knox)

DESERTERS FROM GERMAN VESSELS—TREATY OF 1871 WITH GERMANY

The question as to whether deserters or alleged deserters from German ships-of-war or merchant vessels must, under article 14 of the consular convention of 1871 between the United States and Germany (17 Stat., 929), be given up without the examination authorized by section 5280, Revised Statutes, upon the written request of a German consul and the filing of certain papers named in that article, should be submitted to the proper court for a judicial determination.

Department of Justice,
November 2, 1903.

Sir: I received your letter of August 18, last, inclosing translation of a note from the German ambassador referring to a statement said to have been recently made public by a United States commissioner at San Francisco, defining his future course with reference to the arrest and detention of seamen charged with having deserted from foreign vessels in the port named. The German ambassador contends that under our treaty with his country, upon the written request of the German consul, supported alone by the documents mentioned in the treaty, the persons charged with desertion shall be turned over to the consuls. The commissioner, with whom I have had some correspondence, insists that the accused should be allowed to be heard in his own (78) behalf and that there should be an examination of the question whether he is a deserter. The ambassador complains to you concerning the statement of the commissioner and you request an expression of my views in the premises.

Section 5280 of the Revised Statutes, upon which the commissioner rests his contention, reads as follows:

"On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document. that the person belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government....."

This section originated in an act of March 2, 1829 (4 Stat., 359), which, as amended by an act of February 24, 1855 (10 Stat., 614), was, with a few immaterial changes in punctuation, incorporated into the revision of 1874 as section 5280.

Article 14 of the consular convention of 1871 with Germany is in the following language:

"Consuls-general, consuls, vice-consuls, or consular agents may

arrest the officers, sailors, and all other persons making part of the crews of ships-of-war or merchant vessels of their nation, who may be guilty or be accused of having deserted said ships and vessels, for the purpose of sending them back on board, or back to their country.

(79) "To that end, the consuls of Germany in the United States shall apply to either the federal, state, or municipal courts or authorities; and the consuls of the United States in Germany shall apply to any of the competent authorities, and make a request in writing for the deserters, supporting it by an official extract of the register of the vessel and the list of the crew, or by other official documents, to show that the men whom they claim belong to said crew. Upon such request alone thus supported, and without exaction of any oath from the consuls, the deserters (not being citizens of the country where the demand is made either at the time of their shipping or of their arrival in the port), shall be given up to the consuls." (17 Stat., 929.)

It will be observed that section 5280 applies in cases in which we have treaties providing for the restoration of deserting seamen. When it was enacted we had five treaties on the subject, all of them employing substantially the language relied upon by the ambassador; one of them was with Prussia. It can not, then, be doubted that this statute, which was for the very purpose of carrying out those treaties, was regarded as consistent with their terms. It was followed by a long series of similar treaties, repeating substantially the same language relied upon by the ambassador; and the latest treaties with Great Britain, Japan, and other countries, provide for the return of seamen in the manner prescribed by law. Thus, for three-quarters of a century, this statute, which provides for an examination in addition to an inquiry into the question whether a man belongs to the crew of the vessel, has stood and been enforced upon the theory that it was consistent with our numerous treaties on the subject of the restoration of seamen.

This would seem to raise a presumption in favor of the harmony of the statute with the treaties, and of the acquiescence of numerous foreign governments in the construction placed upon the treaties by congress.

The treaty with Germany is certainly not clearly opposed to such a construction. The first sentence of article 14 provides that consuls may arrest officers, sailors, etc., who may be guilty, or *be accused* of having deserted ships, for the (80) purpose of sending them on board, or back to their country. The next paragraph provides for the delivery up to consuls of "the deserters."

The treaty thus makes a distinction between persons *belonging to the crew* and away from the vessel in this country who are deserters and such persons who are accused of desertion. It provides, not that those accused, but that "the deserters" shall be delivered up. The ambassador reads this differently and says that the word "deserters," in the second paragraph, includes those accused of desertion. The first paragraph provides for arresting, the other for delivering up to the consuls. Hence there may well have been a difference of treatment intended, and only "the deserters" may have been intended to be delivered up. If so, an inquiry to distinguish the deserters from members of the crew away from the ship and accused of desertion would be necessary. This inquiry is provided for by the law which has stood so long upon our statute books.

But this statute and treaty provide a method whereby the judicial authorities may determine this question. According to either the consul may apply to the proper court. If it should be held by the court that the statute is obligatory, notwithstanding differences which may be held to exist between it and the treaty, which the ambassador regards, and is probably right in regarding, as of later date than the statute, then it will be necessary to modify the statute.

If the ambassador's contention is correct, I have no doubt that the court will so decide.

I would suggest, therefore, that an application be made to the proper court and the question fully presented by the German consul-general.

Respectfully,

P. C. KNOX.

The Secretary of State.

ANALYSIS OF TREATIES OF THE UNITED STATES RELATING TO CONSULS[1]

GENERAL ACT FOR THE REPRESSION OF AFRICAN SLAVE TRADE

Signed July 2, 1890.

Art.

LXXI. Assistance of diplomatic and consular officers to local authorities and presence at trials.

ARGENTINE REPUBLIC

Treaty concluded July 27, 1853. (Friendship, commerce, and navigation.)

Art.

IX. Custody of estates of deceased citizens by consuls. Delivery of property of deceased citizens to legal heirs.

X. Establishment of consuls. Inviolability of consulates and archives. Most favored nation treatment.

AUSTRIA—HUNGARY

Consular convention concluded July 11, 1870. (Rights, privileges, and immunities of consuls.)

Art.

I. Establishment of consuls. Exequatur. Privileges.

II. Exemption of consuls from military billetings, service, taxation, etc.

III. Exemption of consuls from appearing as witnesses in courts of justice.

IV. National coat of arms and flags.

V. Inviolability of consulate and archives.

VI. Temporary transaction of business in case of absence, death, etc., of consuls.

VII. Appointment of vice-consuls and consular agents by consuls. Privileges.

VIII. Form of communication of consuls with the local authorities.

IX. Consul's right to receive depositions of passengers and crew. He may deliver certificates.

[1] This analysis, made by Mr. Woislav Petrovitch, formerly American Vice-Consul at Belgrade, Servia, includes the treaties of the United States contained in the Consular Regulations (1896) and those proclaimed since. No treaties with countries where exterritorial jurisdiction is exercised have been retained.

X. Consular jurisdiction over vessels and crew. Presence of consuls at judicial proceedings and search of vessels.
XI. Jurisdiction over seamen.
XII. Arrest of deserters.
XIII. Settlement of damages at sea.
XIV. Wrecks.
XV. Privileges of consuls. Most favored nation treatment.
XVI. Custody of property of deceased citizens by consular officers and search for legal heirs.

BELGIUM

Treaty concluded March 9, 1880. (Rights, privileges, and immunities of consuls.)

Art.
I. Establishment of consuls. Most favored nation treatment.
II. Privileges and immunities of consuls. Commission. Exequatur.
III. Exemption of consuls from military service and taxation, except when traders and landed proprietors.
IV. Exemption of consuls from appearing as witnesses in courts except in criminal cases.
V. National coat of arms and flag.
VI. Inviolability of consuls, consulates, and archives. Consulates not to serve as asylum.
VII. Temporary transaction of business in case of absence, death, etc. of consuls. Privileges of officers in charge.
VIII. Appointment of vice-consuls and consular agents by consuls. Privileges.
IX. Communication of consuls with local authorities in case of infraction of treaties and protection of their countrymen.
X. Consuls' right to receive depositions of passengers and crew. They may deliver certificates.
XI. Consular jurisdiction over vessels and crew.
XII. Consular jurisdiction over crew. Arrest of deserters.
XIII. Damages at sea.
XIV. Wrecks at sea. Protection of persons and goods saved from wreck. Intervention of local authorities prohibited.
XV. Custody of property of deceased citizens and forwarding of same to parties interested.

BOLIVIA

Treaty concluded May 13, 1858. (Peace, friendship, commerce, and navigation.)

Art.
XXXI. Establishment of consuls. Most favored nation treatment.
XXXII. Rights, privileges and immunities of consuls. Commission. Exequatur.

XXXIII. Exemption of consular officers from imposts and taxes, except when traders or landed proprietors. Inviolability of archives.

XXXIV. Communications with local authorities in regard to arrest of seamen deserters. Consular jurisdiction over vessels and crew.

COLOMBIA

Treaty concluded May 4, 1850, with New Granada. (Consular privileges.)

Art.

I. Freedom of commerce. Establishment of consuls.

II. Commission. Exequatur.

III. Consular functions and authority.

IV. Consuls of each republic may employ their good offices in favor of individuals of the other having no consul in another country.

V. Consuls have no diplomatic character. Prerogatives.

VI. Consuls subject to local jurisdiction, excepting in the cases in which they receive exemption. National treatment.

VII. Consuls not authorized to issue passports. Consular jurisdiction over vessels and crew.

COSTA RICA

Treaty concluded July 10, 1851. (Friendship, commerce, and navigation.)

Art.

VIII. Custody of property of deceased citizens. Search for legal heirs.

IX. Citizens exempt from military service. National treatment.

X. Establishment of consuls and diplomatic representatives. Privileges and immunities.

DENMARK

Treaty concluded April 26, 1826. (Friendship, commerce, and navigation.)

Art.

VIII. Freedom of commerce and navigation. Establishment of consuls. Most favored nation treatment.

IX. Consular commission and exequatur.

X. Consuls and consular officers exempt from public and military services. Exemption from taxation if not traders or landed proprietors.

Additional articles, concluded July 11, 1861.

Art.

I. Consular jurisdiction over vessels and crew.

II. Arrest of deserters.

DOMINICAN REPUBLIC

Treaty concluded February 8, 1867. (Amity, commerce, navigation, and extradition.)

Art.

XXVI. Establishment of consuls. Privileges. Most favored nation treatment for non-trading consular officers. Inviolability of archives. Consular jurisdiction over vessels and crew. Arrest of deserters.

XXVII. Extradition of criminals.

ECUADOR

Treaty concluded June 13, 1839. (Peace, friendship, navigation and commerce.)

Art.

XXIX. Freedom of commerce and navigation. Establishment of consuls. Most favored nation treatment.

XXX. Consular commission and exequatur.

XXXI. Privileges of consular officers. Exemption of non-trading consular officers from taxation. Inviolability of archives.

XXXII. Arrest of deserters.

XXXIII. Powers and immunities of consuls.

XXXIV. Most favored nation treatment.

FRANCE

Convention concluded February 23, 1853. (Consular privileges.)

Art.

I. Establishment of consuls. Commission. Exequatur.

II. Privileges. Exemption of non-trading consuls from taxation. Arms and flags. Consuls not obliged to appear as witnesses in courts. Consular pupils and their privileges. Temporary transaction of business in case absence, death, etc. of consuls. Prerogatives of acting consuls.

III. Inviolability of consulates and archives. Consulates not to serve as asylum.

IV. Consular rights regarding the protection of their countrymen.

V. Appointment of vice-consuls and consular agents by consuls. Approval of local authorities necessary.

VI. Consuls' right to deliver certificates.

VII. National treatment of citizens.

VIII. Consular jurisdiction over vessels.

IX. Arrest of deserters. Form of communication of consuls with local authorities.

X. Receiving declarations, etc. of vessels by consuls. Examination of stowage by consuls.
XI. Wrecks. Measures to be taken for protection. Re-exported goods from wrecks not liable to any duty.
XII. Privileges and immunities of consular officers. Most favored nation treatment.

GERMAN EMPIRE

Consular convention concluded Dec. 11, 1871. (Consuls and trade-marks.)

Art.

I. Establishment of consuls.
II. Commission. Exequatur.
III. Privileges and immunities of consular officers. Exemption from taxes if not landed proprietors or traders. Most favored nation treatment.
IV. National coat of arms and flags.
V. Inviolability of consuls, consulates and archives. Consulates not to serve as asylum.
VI. Temporary transaction of business in case of absence, etc. of consuls.
VII. Appointment of vice-consuls and consular agents by consuls.
VIII. Consular communications with local authorities in regard to protection of their countrymen.
IX. Consular jurisdiction over vessels.
X. Custody of property of deceased citizens by consuls. Search for legal heirs.
XI. Inventorying and safe-keeping of goods and effects left by citizens on ships.
XII. Consuls' rights on board of ships.
XIII. Consular jurisdiction over vessels.
XIV. Arrest of deserters. Communication with local authorities.
XV. Damages at sea.
XVI. Wrecks.
XVII. Patents, trade-marks. National treatment.

GREAT BRITAIN

Concluded July 3, 1815. (Commerce.)

Art.

IV. Establishment and treatment of consuls.

Treaty concluded June 2, 1892. (Reclamation of deserting seamen.)

Art.

I. Arrest of deserters.

GREECE

Treaty concluded Dec. 10-22, 1837. (Amity and commerce.)

Art.

XII. Establishment of consuls. Privileges. Consular jurisdiction over vessels.

XIII. Arrest of deserters.

Consular convention concluded November 19, 1902. (Dec. 2, 1902.)

Art.

I. Appointment of consular officers.
II. Consular privileges. Most favored nation treatment.
III. Exemptions.
IV. Testimony by consuls.
V. Arms and flags.
VI. Immunities of offices and archives.
VII. Privileges of acting officers.
VIII. Vice-consuls and agents appointed by consuls.
IX. Communication of consuls with local authorities.
X. Notarial powers.
XI. Estates of deceased citizens.
XII. Shipping disputes.
XIII. Deserters from ships.
XIV. Damages to vessels at sea.
XV. Shipwrecks and salvage.
XVI. Examination of vessels.

GUATEMALA

Treaty concluded Aug. 27, 1901. (Convention relative to tenure and disposition of real and personal property.)

Art.

I. Disposition of real property.
II. Disposition of personal property.
III. Notice of decease of citizens.

HANSEATIC REPUBLICS

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[1] This is an authorized extract from the admirable INDEX ANALYSIS OF THE FEDERAL STATUTES by Scott and Beaman. The references preceded by R. S. are to sections of the Revised Statutes (1873). The other references are to the volumes and page of the Statutes at Large and to the date of the enactment of the statute.

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[1] This is an extract from the CONSOLIDATED INDEX TO UNITED STATES STATUTES AT LARGE of which only twenty-five copies were printed. Although the arrangement is poor it will be found serviceable in many instances.

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(A.) Marriage

Discussion of consular marriages concluding that United States consuls have not the right to solemnize; see **Atty. Gen. Vol. VII, p. 18, 1854, U. S.**

Solemnization by American consul; see **Loring v. Thorndike, 1862, U. S.**

Consuls might acquire the right to solemnize marriage by municipal act of any foreign government giving legality to a marriage within it so celebrated, in which case there would be nothing in our law, or in our public policy, to forbid a consul officiating in that relation; secondly, perhaps, specially by treaty, or generally by act of congress; see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

Consuls do not possess power to solemnize marriage and department of state cannot give them that power; see **Atty. Gen. Vol. VII, p. 342, 1855, U. S.**

"If, indeed, being a subject of the state, he has power as a local magistrate to solemnize marriage, or, being a foreigner, he has the same power as clergyman, he may do it, but, in either case, not in his capacity as consul;" see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

Consul is legally incapable of solemnizing marriage without authority of the local government; see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

(B.) Arbitration

Consul has no judicial power but acts as arbitrator in certain cases; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

"When a consul intervenes in a controversy between master and seamen, by mutual consent of the disputants, he acts as an arbitrator and not as consul;" see **Atty. Gen. Vol. XXI, p. 201, 1895, U. S.**

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Treaty with Austria gives Austrian consul right to apply to local authorities for protection of his countrymen; see **Von Thodorevich v. Franz Josef, 1907, U. S.**

Sailors generally under jurisdiction of consul of nationality of ship for matters concerning shipping, but in other cases, and in those of special gravity, the consul's duty to care for nationals revives; see **Two Friends, 1799, G. B.**

"Officious" letters of British consuls were not allowed to be read in court when the United States government felt that the British government was attempting to violate the neutrality laws of the United States; see **Atty. Gen. Vol. VIII, p. 469; 1855, U. S.**

Consul intervenes to prevent the state of Louisiana taxing an estate contrary to treaty; see **(Succession of) Dufour, 1855, U. S.**

Consul of Oldenburg charged with the duty of looking after prizes and nationals detained as prisoners of war and making the necessary intercessions before the proper tribunals to procure them their liberty; see **Viveash v. Becker, 1814, G. B.**

Consul's functions "are purely of a commercial nature, and such as properly belong to a consul, those of advice and intercession and there is no one function of state purposed to be performed by him as representing the sovereign of his state; see **Viveash v. Becker, 1814, G. B.**

Consul intervened to secure the release of an imprisoned American; see **Atty. Gen. Vol. XXII, p. 32, 1898, U. S.**

Protection of Filipinos and Porto Ricans by American consuls; see **Atty. Gen. Vol. XXIII, p. 402-404, 1901, U. S.**

Statutes for care of destitute seamen do not apply to Filipinos; see **Atty. Gen. Vol. XXIII, p. 402, 1901, U. S.**

DUTIES IN CARING FOR THE INTERESTS OF ABSENT OR INCAPACITATED NATIONALS

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Consuls should repatriate a minor stowaway; see **Luscom v. Osgood, 1844, U. S.**

Consul's duty to look after estates left to minors; see **Atty. Gen. Vol. VIII, p. 100, 1856, U. S.**

Consul may not appear for an infant, party to proceedings, so as to give the surrogate's court jurisdiction of such party, without the issuance of a citation; see **(In re) Peterson's Will, 1906, U. S.**

(B.) Care of estates

See (In re) Tartaglio, 1895, U. S.; (Succession, of) Rabasse, 1895, U. S.; (In re) Davenport, 1904, U. S.

Consul's duty to care for estate left to heirs in sending state; see Atty. Gen. Vol. VIII, p. 100, 1856, U. S.

Nature of consul's action when caring for estates; see Atty. Gen. Vol. VIII, p. 99, 1856, U. S.

French consul intervenes to prevent the state of Louisiana taxing an estate contrarily to treaty; see (Succession of) Dufour, 1855, U. S.

"It is clear that under this treaty system between these three Latin countries—Spain, Italy, and France—the consul is to exercise an exterritorial judicial power and to be the real administrator of the estate; but that disputes in which the country where the death occurred has some special interest, as where its own people or the people of a third country whom it should protect are concerned, are to be carved out of his jurisdiction and settled by the local judicial authority, leaving him to resume his functions when these special questions have been determined;" see Atty. Gen. Vol. XXIII, p. 104, 1900, U. S.

Consul must give heed to state laws when real property is included; see Atty. Gen. Vol. VII, p. 272, 1855, U. S.

Consul's duties in caring for estates and the application of the law of 1855; see Atty. Gen. Vol. VII, p. 270, 1855, U. S.

"The face of a banker's circular letter of credit, found in the possession of an American dying abroad, is not assets to that amount to be administered by the consul;" see Atty. Gen. Vol. VII, p. 542, 1855, U. S.

Fees of consuls for the care of estates; see Atty. Gen. Vol. VII, p. 255-259, 1855, U. S.

Nature of American consul's action when administering an estate; see Sturgis v. Slacum, 1836, U. S.

In the course of the administration of an estate the French consul was entitled to be heard by the court, not as a party but informally, as the national agent of supposedly interested parties; see Ferrie v. The Public Administration, 1855, U. S.

(C.) Right of a consul to administer estates by application of treaty provisions

German consul's right to administer estate; see (The) General McPherson, 1900, U. S.

French consul's right to administer an estate; see **(In re) Lobrasciano's Estate, 1902, U. S.**

Russian consul's right to become administrator. He must give a bond and conduct himself as any administrator; see **(In re) Wyman, 1906, U. S.**

Right of consul to take charge of estate in accordance with treaty decided by international arbitration; see **(In re) Vergil, 1857, U. S.**

Consul has right to administer estate; see **(In re) Peterson's Will, 1906, U. S.**

Court refused to grant Swedish vice-consul the administration of estate of a Swede; see **Lanfear v. Ritchie, 1854, U. S.**

Consul allowed to act as administrator on giving usual certificate; see **(In re) Logiorato's Estate, 1901, U. S.**

Consul given administration by surrogate's court, subject to usual condition. Therefore, as surrogate's court does not obtain jurisdiction over an estate unless minor heirs are cited to appear, consul cannot take administration of surrogate's court unless they are cited; see **(In re) Peterson's Will, 1906, U. S.**

British court refused to issue letters of administration to the American consul; see **Aspinwall v. The Queen's Proctor, 1839, G. B.**

State statutes must give way to treaty stipulations and the procedure followed must conform to treaty stipulations as much as possible; see **(In re) Fattosini, 1900, U. S.**

(D.) **Representation of absent nationals in court** (see also Care of Estates)

See **Bello Corrunes, 1821, U. S.; (The) Anne, 1818, U. S.; (The) Antelope, 1825, U. S.; (The) London Packet, 1815, U. S.; Gernon et al v. Cochran, 1804, U. S.; One Hundred and Ninety-four Shawls, 1848, U. S.; (The) Adolph, 1851, U. S.; Rowe v. Brig, 1818, U. S.; Simpson v. Fogo, 1862, G. B.; (The) Divina Pastora, 1819, U. S.**

In the course of the administration of an estate the French consul was entitled to be heard by the court, not as a party but informally, as the national agent of supposedly interested parties; see **Ferrie v. The Public Administrator, 1855, U. S.**

"The consul appears very properly, to have employed Mr. Mitcheson as proctor and advocate in the cause, but, in form, as proctor and advocate for the respondent, and not of the consulate;" see **Townshend v. The Mina, 1868, U. S.**

British consul appears for original owners and French con-

sul claims ship as a valid prize; see **McDonough v. Dannery, 1796, U. S.**

German consuls authorized by article 8 of treaty to represent interests of German citizens in court; see **(The) General McPherson, 1900, U. S.**

Before property can be delivered to a consul proof of the individual proprietary interest must be accepted; see **(The) Antelope, 1825, U. S.**

Representation in court of a minor's interest by the consul; see **(In re) Peterson's Will, 1906, U. S.**

The acting British consul filed a claim in behalf of absent owners whom he thought to be British; see **(The) Elisabeth, 1862, U. S.**

A consul may represent the interests of nationals in prize proceedings, but his action is in the nature of surveillance; see **Atty. Gen. Vol. VIII, p. 101, 1856, U. S.**

"It is clear that he (consul) has no right, by any rule of public law, or international comity, to be heard in the case by the court, otherwise than as a witness, whether enforced or voluntary;" see **Atty. Gen. Vol. VIII, p. 470, 1855, U. S.**

French consul intervened to prevent the state of Louisiana levying a tax of 10 per cent. on an estate of a deceased national contrary to treaty provisions; see **(Succession of) Dufour, 1855, U. S.**

Consul may intervene in behalf of citizens who are absent but interested in the process; see **Robson v. The Huntress, 1851, U. S.**

Consul may not appear for an infant, party to the proceedings, so as to give the surrogate's court jurisdiction of such party, without the issuance of a citation; see **(In re) Peterson's Will, 1906, U. S.**

ACTS MOTIVED BY THE INTEREST OF THE SENDING STATE RATHER THAN BY NATIONALITY

(A.) Notarial acts

Consuls not required to perform notarial acts; see **Atty. Gen. Vol. XII, p. 1, 1866, U. S.**

Authentication of signature of notary of receiving state is not a notarial act; see **Atty. Gen. Vol. XII, p. 1, 1866, U. S.**

Consul replaces state officials for the performance of certain acts; see **St. John v. Croel, 1843, U. S.**

An notarial verification of a consul's signature to an affidavit is not required; see **(In re) Magee, 1885, G. B.**

It is not the duty of United States consuls to attest the signatures of public functionaries of the receiving state; see **Stein v. Stein's Curator, 1836, U. S.**

United States consul certified to the official character of officials of the receiving state in conformity with the law of Louisiana; see **(Succession of) Wedderburn, 1841, U. S.**

A British consul's authentication of an affidavit taken before an American judge is a notarial act which he is empowered by statute to perform; see **(Trustee of Mrs.) Barber, 1835, G. B.**

Court declared that the old practice allowing the swearing of affidavits before notaries was still in force in a case where no British consul was within 150 miles from deponent's residence; see **Cooke v. Wilby, 1884, G. B.**

It may be that the laws of a state of the United States give validity to certain services performed by consuls; see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

The value of unofficial services customarily performed by consuls depends entirely upon the fact that the person rendering them is a consular officer; see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

"Any consul" in statute embraces consuls of every grade; see **Mott v. Smith, 1860, U. S.**

The efficacy of the act may be due to the faith generally reposed in consular officers; see **Atty. Gen. Vol. XX, p. 93, 1891, U. S.**

Consuls have no general power of administering oaths, though they are authorized to authenticate depositions made in foreign countries; therefore the oath required of an applicant for a patent should not be taken before a consul but by a competent magistrate and the deposition so taken should be verified by the official certificate of authentication of the consul; see **Atty. Gen. Vol. III, p. 532, 1840, U. S.**

Drawing up a power of attorney, bottomry bond, will, or any similar service, is a notarial, not a consular act; see **Atty. Gen. Vol. VII, p. 259, 1855, U. S.**

The authentication by the diplomatic and consular officers of the United States of the copies of depositions, warrants and papers to be received as evidence of criminality to secure the extradition is sufficient; see **Rice v. Ames, 1900, U. S.**

Administration of oaths by consul according to the provision of section 20 of the bankrupt act of 1898; acknowledgment

of a power of attorney before a consul is sufficient to authorize the proof of the creditor's claim before the referee; see (In re) Sugenheimer, 1899, U. S.

A vice and deputy consul authenticated certificates to be used in a petition for letters of administration in sending state and also certified himself to be a notary public of the United States. Held: that this was not such an authentication as the statute section 952 Code official procedure directed; see Brown v. Landon, 1883, U. S.

The British consul received an acknowledgment, of which the affidavit verifying the same had been sworn to before the provisional British consul, when no notary or other official before whom it could have been sworn was within many hundred miles; see (In re) Darling, 1845, U. S.

(B.) Authentication of signatures

There is no law of the United States making it the duty of the consul to acknowledge and authenticate the signature or the official character of a foreign notary public; see Mosby v. United States, 1888, U. S.; Atty. Gen. Vol. XI, p. 1, 1854, U. S.

Concerning consular certificate regarding the official character of a foreign register; see Catlett v. Pacific Insurance Co., 1826, U. S.

American court considered that an American consul's certificate of the signature of the acalde, who himself had certified the signature and official character of the Spanish notaries, ought to be received; see Ferrers v. Bosel, 1821, U. S.

(C.) Authentication of translations

Interpreters are always sworn, and the translation by the consul, not on oath, can have no greater validity than that of any other respectable man; see Church v. Hubbard, 1804, U. S.

(D.) Authentication of the laws of foreign states

Consuls are not entrusted with the power of authenticating the laws of foreign nations; see Church v. Hubbard, 1804, U. S.

Case in which consul testified as to the maritime law of his state; see Madonna d' Idra, 1811, G. B.

(E.) Acknowledgments of powers of attorney

See Stewart v. Linton, 1902, U. S.; St. John v. Croel, 1843, U. S.

A deputy consul can take the acknowledgment of a power of attorney; see **Stewart v. Linton, 1902, U. S.**

The administration of oaths by a consul according to the provisions of section 20 of the bankrupt act of 1898; the acknowledgment of a power of attorney before a consul was sufficient to authorize the proof of the creditor's claim before the referee; see **(In re) Sugenheimer, 1899, U. S.**

A vice and deputy consul has authority to acknowledge a power of attorney; "for while he acted in that capacity he was entitled to exercise the authority vested by law in the consul himself;" see **Brown v. Landon, 1883, U. S.**

(F.) Acknowledgment of deeds

Competence of consul to take an acknowledgment of a deed; see **Scanlon v. Wright, 1833, U. S.; St. John v. Croel, 1843, U. S.**

Attestation of deeds must be taken within consulate; see **McCandless v. Yorkshire, 1897, U. S.**

When without indication of place where taken, an acknowledgment is not presumed to have been taken within the consular district; see **McCandless v. Yorkshire, 1897, U. S.**

"A consul of the United States is authorized to take at his consulate an acknowledgment of a deed to realty situated in this state, and his certificate, under official seal, is evidence of such acknowledgment;" see **Long v. Powell, 1904, U. S.**

Certificates of acknowledgment, if they purport to be by the one authorized, are *prima facie* evidence of the execution of the deed as well as of the official character of the persons giving them. No *aliunde* proof of signature is necessary; see **Mott v. Smith, 1860, U. S.**

(G.) Affidavits

See **Savage v. Birckhead, 1838, U. S.; Herman v. Herman, 1825, U. S.; Browne v. Palmer, 1902, U. S.; St. John v. Croel, 1843, U. S.**

Value of affidavits under state laws; see **Marine Wharf v. Parsons, 1897, U. S.**

Case in which state court passed on legality of an oath administered by a consul; see **Seidel v. Peschkaw, 1859, U. S.**

Consul must take oath prior to entry upon discharge of duties to be entitled to salary—This oath cannot be taken before a consul of another state; see **Otterbourg's Case, 1869, U. S.**

Consul is a representative of the United States within the

meaning of the act of 1856 and hence has authority to administer an oath; see **Seidel v. Peschkaw, 1859, U. S.**

A deputy consul can take the acknowledgment of a power of attorney; see **Stewart v. Linton, 1902, U. S.**

Competence of commercial agent to take acknowledgments under the laws of Pennsylvania; see **Moore v. Miller, 1892, U. S.**

Consuls are not competent to take affidavits; see **(In re) Eady, 1838, G. B.; (In re Anne) Cooper, 1855, G. B.**

When shown the difficulty of getting an affidavit sworn before the magistrate in Russia, the British court allowed one sworn before a consul to be enrolled; see **Davy v. Maltwood, 1841, G. B.**

When by German law the British consul was not allowed to administer an oath, the affidavit could be sworn before a German judge; see **(In re) Fawcus, 1884, G. B.**

Court admits affidavits taken before the British consul in Russia, because magistrates of Russia are not empowered to take affidavits; see **(In re) Daly, 1841, G. B.**

Gives an example of a consul's certificate, and a certificate of a notary public of the receiving state, to the effect that the consul is entitled to administer oaths; see **(Ex parte) Hutchinson, 1825, U. S.**

A British consul's authentication of an affidavit taken before an American judge is a notarial act, which he is empowered by statute to perform; see **(Trustee of Mrs.) Barber, 1835, G. B.**

No notarial certificate of an affidavit made before the consul is required, because the consul's official character is easily capable of proof; see **(Ex parte) Bird, 1852, G. B.**

Court declared that the old practice allowing the swearing of affidavits before notaries was still in force, in a case where no British consul was within 150 miles; see **Cooke v. Wilby, 1884, G. B.**

The British court received an acknowledgment, of which the affidavit verifying the same had been sworn before the provisional British consul, no notary or other official before whom it could have been sworn, being within many hundred miles; see **(In re) Darling, 1845, G. B.**

Gives the rule of the British court regarding the manner of taking affidavits abroad; see **Cruttenden v. Bourbell, 1808, G. B.**

(H.) Value of consul's certificate

What the consul's certificate is competent to give; see **Brown v. The Independence, 1836, U. S.**

Value of consul's certificate as to facts relating to his office; see **Toler v. White, 1834, U. S.**

Value of consul's certificate as to facts; see **Levy v. Burley, 1836, U. S.**

Value of consul's certificate, as proving facts and being binding on the parties; see **Waldron v. Coombe, 1810, G. B.; St. John v. Croel, 1843, U. S.**

Value of consul's certificate relating to his official acts; see **Waldron v. Coombe, 1810, U. S.**

Value of consul's certificate to facts concerning sailors; see **(The) Coriolanus, 1839, U. S.**

Value of consul's certificate to facts, when he is called upon to act by statute; see **Lamb v. Briard, 1848, U. S.**

The Spanish consul, to secure the arrest of a deserter under the treaty, must produce the original roll, or corresponding document, containing the names of the crew. A copy certified by the consul does not meet the requirements of the treaty; see **Atty. Gen. Vol. IX, p. 97, 1857, U. S.**

An assignment of a patent purporting to have been executed before a consul general is sufficiently proved by the signature of the consul general and the seal of the United States consulate general; see **Matheson v. Campbell, 1895, U. S.**

Value of a passport issued by a consul as evidence; see **Foster v. Davis, 1822, U. S.**

Value of consul's certificate as evidence of desertion; see **Lewis v. Jewhurst, 1866, G. B.**

"A consul of the United States is authorized to take at his consulate an acknowledgment of a deed to realty situated in this state, and his certificate, under official seal, is evidence of such acknowledgment;" see **Long v. Powell, 1904, U. S.**

A vice and deputy consul authenticated certificates to be used in a petition for letters of administration in sending state and also certified himself to be a notary public of the United States. Held: that this was not such an authentication as the statute section 952 code official procedure directed; see **Brown v. Landon, 1883, U. S.**

A passport is not evidence that individual has been in foreign country; see **Foster v. Davis, 1822, U. S.**

Authenticity of a deposition taken by an officer styling himself a "consular agent" and using a seal containing the words United States Commercial Agency;" see **Schunior v. Russell, 1892, U. S.**

"If the attestation of the signature, and right of the person

who administered the oaths, were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *prima facie* evidence, though not under the great seal of the state;" see **Stein v. Bowman, 1839, U. S.**

Case in which court refused to accept consul's certificate of role of ship, even though bound by treaty to give faith to consul's certificate; see **United States v. Judge Lawrence, 1795, U. S.**

Value of consul's certificate; see **Matthews v. Offley, 1837, U. S.; Foster v. Davis, 1822, U. S.; (The) Alice, 1882, U. S.; (The) Coriolanus, 1839, U. S.**

Value of consul's proceedings as evidence; see **Graves v. (The) W. F. Babcock, 1897, U. S.; St. John v. Croel, 1843, U. S.**

Value of consul's certificate to facts, where he acts under statute to discharge a sailor; see **(The) Paul Revere, 1882, U. S.**

Conclusiveness of consul's declaration, signed to the master's statement of discharge; see **(The) Lilian M. Vigus, 1879, U. S.**

Value of French consul-general's despatch as evidence; see **Gernon v. Cochran, 1804, U. S.**

Value of the consul's certificate declaring what is the law of shipping of his state; see **Madonna d' Idra, 1811, G. B.**

Nature of consul's act in discharging seamen, and the value of his certificate; see **Campbell v. Steamer Uncle Sam, 1856, U. S.; Hutchinson v. Coombs, 1825, U. S.; Jenks v. Cox, 1872, U. S.**

Sound List and Petersburg List are documents transmitted by British consuls, which state the arrival of different ships. These lists cannot be received as evidence, as they are mere representations; see **Roberts v. Eddington, 1801, G. B.**

Lists of the arrival of ships, sent home by consuls, are mere representations and cannot be received as evidence; see **Roberts v. Eddington, 1801, G. B.**

Authentication of extradition proceedings; see **(In re) Herres, 1887, U. S.**

(I.) Taking depositions

Action of consul concerning depositions; see **Savage v. Birckhead, 1838, U. S.; Semmens v. Walters, 1882, U. S.; Adams v. State, 1885, U. S.**

Authority of consul to take deposition *de bene esse;* see **Bischoffscheim v. Baltzer, 1882, U. S.; (The) Alexandria, 1906, U. S.**

Value of affidavits to a deposition taken before the com-

mercial and naval agent of the United States; see **Welsh v. Hill, 1807, U. S.**

The court received the return of a commission, executed by a vice-consul as commissioner named by a court; see **Stiff v. Nugent, 1843, U. S.**

Consuls have no general power of administering oaths, though they are authorized to authenticate depositions made in foreign countries; therefore the oath required of an applicant for a patent should not be taken before a consul, but by a competent magistrate, and the deposition so taken should be verified by the official certificate of authentication of the consul; see **Atty. Gen. Vol. III, p. 532, 1840, U. S.**

Conditions covering the issuance of letters rogatory and open commissions; see **Atty. Gen. Vol. XXIV, p. 70, 1902, U. S.**

Spanish consuls in Great Britain are instructed to obtain the testimony of voluntary witnesses by proceedings before a magistrate, but to attend to citations themselves; see **Atty. Gen. Vol. XXIII, p. 114, 1900, U. S.**

Court declares that it has no authority to compel witnesses to testify before Spanish consul; see **Spanish Consul's Petition, 1867, U. S.**

All depositions must be taken under commissions; see **Stein v. Bowman, 1839, U. S.**

"It cannot be conceived that the general government sends representatives abroad for the purpose of acting as the executive officers of the different state courts in the Union. It is true that those representatives sometimes act as ministerial officers of such courts, as for instance, to procure testimony, and the like; but they do so with the special authority of state legislation, providing distinctly for such cases;" see **Interdiction of Joseph Dumas, 1880, U. S.**

Authenticity of a deposition taken by an officer styling himself a "consular agent" and using a seal containing the words "United States Commercial Agency;" see **Schunior v. Russell, 1892, U. S.**

(J.) **Administering oaths** (see Depositions; Affidavits)

Consuls have no general power of administering oaths, though they are authorized to authenticate depositions made in foreign countries. Therefore the oath required of an applicant for a patent should not be taken before a consul but by a competent magistrate and the deposition so taken should be verified by the

official certificate of authentication of the consul; see **Atty. Gen. Vol. III, p. 532, 1840, U. S.**

REPRESENTATIVE OR POLITICAL FUNCTIONS

Consul referred to as representative of his country; see **Herzogin Marie, 1861, G. B.; Fry v. Cook, 1876, U. S.; Davis v. Packard, 1833, U. S.; Bucker v. Klorkgeter, 1849, U. S.**

Consuls have no authority to grant licenses exempting vessels from capture; see **(The) Hope, 1813, G. B.; Benito Estenger, 1900, U. S.; Rogers v. Amado, 1847, U. S.**

Lord Stowell does not declare whether the consul or the minister was referred to as representative in speaking of the case of (The) Courtney; see **(The) Wilhelm Frederick, 1823, G. B.**

Consul's functions "are purely of a commercial nature, and such as properly belong to a consul, those of advice and intercession and there is no one function of state purposed to be performed by him as representing the sovereign of his state;" see **Viveash v. Becker, 1814, G. B.**

Consuls are not public ministers and are not invested with any representative character; see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

Mexican consul makes complaint under oath to secure extradition—His official character must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him in its behalf; see **Ornelas v. Ruiz, 1895, U. S.**

(A.) Observance of treaties (see Treaties under Immunities)

(B.) Consular reports

Sound Lists and Petersburg List are documents transmitted by British consuls which state the arrival of different ships. These lists cannot be received as evidence as they are mere representations; see **Roberts v. Eddington, 1801, G. B.**

(C.) Representation of sending state in court

Consul may not represent his sovereign nor vindicate his prerogative without special authority; see **(The) Anne, 1818, U. S.**

A consul cannot intervene for his sovereign when said sovereign has a minister or ambassador resident in the country; see **Robson v. (The) Huntress, 1851, U. S.**

Consul has no right to represent the personality of his sovereign or his prerogatives but may represent the interests of any individual or a mass of individuals in the receiving state; see **Von Thodorovich v. Franz Josef, 1907, U. S.**

Consul of Greece appealed to British court to enforce the decision of a Greek court against a Greek ship; see **(The) Evangelistria, 1876, G. B.**

Intervention of consul to represent his government's interest; see **(The) Conserva, 1889, U. S.**

British and French consuls represent claims for the possession of a prize; see **McDonough v. Dannery, 1796, U. S.**

Protest of consul against illegality of a prize condemnation heeded by court; see **(The) Betty Cathcart, 1799, G. B.**

Representation of government in prize cases; see **Gernon v. Cochran, 1804, U. S.**

Consul presents claim of government for violation of neutrality by prize proceedings; see **Vrow Anna Catharina, 1803, G. B.**

Dutch consul protest to Portuguese government against British violation of Portugese neutrality; see **Vrow Anna Catharina, 1803, G. B.**

Among consul's functions to see that territory of receiving state is not made a base for fitting out expeditions against his government; see **(The) Conserva, 1889, U. S.**

Consul of Oldenburg was charged with the duty of looking after prizes and nationals detained as prisoners of war and making the necessary intercessions before the proper tribunals to procure them their liberty; see **Viveash v. Becker, 1814, G. B.**

(D.) Arrest of deserters

See **United States v. Judge Lawrence, 1795, U. S.; United States v. Motherwell, 1900, U. S.; Atty. Gen. Vol. XII, p. 465, 1868, U. S.**

Declares that court has always helped masters to recover deserters; see **Willendson v. The Forsoket, 1801, U. S.**

The Spanish consul to secure the arrest of a deserter under the treaty must produce the original roll or corresponding document containing the names of the crew. A copy certified by the consul does not meet the requirements of the treaty; see **Atty. Gen. Vol. IX, p. 97, 1857, U. S.**

Case in which deserter was forcibly taken from the custody of the United States marshal while the latter was, upon the written order of the consul, delivering him to the master of the vessel—Court held that the law required the delivery to the con-

sul and that acting under the direction of the consul the marshal was not in the performance of a duty enjoined by law. Hence the defendants could not be punished for obstructing an officer in the performance of a duty enjoined by law; see **United States v. Kelley, 1901, U. S.**

Question whether alleged deserters should be given up to German consul by reason of the application of article 14 of the Convention of 1871 with Germany, should be submitted to the proper court for a judicial determination; see **Atty. Gen. Vol. XXV, p. 77, 1903, U. S.**

(E.) Extraditions

See **Benson v. McMahon, 1887, U. S.**; **(In re) Grin, 1901, U. S.**; **(In re) Adutt, 1893, U. S.**; **(In re) Kaine, 1852, U. S.**

Representative character of consul when asking for the delivery of prisoners to be transported to the sending state for trial; see **Atty. Gen. Vol. VIII, p. 76, 1856, U. S.**

Consul's duty in relation to extradition; see **Atty. Gen. Vol. VIII, p. 84, 1856, U. S.**

Consul's action in securing the custody of a seaman who had committed a crime for transportation to America for trial; see **Atty. Gen. Vol. VII, p. 722, 1856, U. S.**

"No evidence was required that the Russian consul had authority to make the complaint;" see **Grin v. Shine, 1902, U. S.**

Complaint under oath of Belgiun consul-general, although based entirely upon the strength of depositions and telegrams from sending state, is sufficient to warrant holding prisoner; see **(Ex parte Henry) Van Hoven, 1876, U. S.**

Complaint in extradition case verified by a foreign consul is sufficient if made officially although not based on personal knowledge; see **(In re Francois) Farez, 1870, U. S.**

Mexican consul makes complaint under oath to secure extradition—His official character must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him in its behalf; see **Ornelas v. Ruiz, 1895, U. S.**

Swiss consul asks for warrant for delivery of Roth to the authorities of the Swiss Confederation; see **(In re) Roth, 1883, U. S.**

(F.) Exercise of diplomatic functions

See **(In re) Baiz, 1899, U. S.**

Consul's functions "are purely of a commercial nature, and such as properly belong to a consul, those of advice and intercession and there is no one function of state purposed to be performed by him as representing the sovereign of his state;" see **Viveash v. Becker, 1814, G. B.**

"The United States may, with the consent of the other party, superadd to the regular duties of consul any of those of ministers;" see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

Consul made *chargé d'affaires* becomes invested with full diplomatic privileges, "yet becomes so invested as *chargé d' affaires*, not as consul, and the fact of such casual duplicature of functions does not change the legal status of consul, whether they be regarded through the eye of the law of nations or that of the United States;" see **Atty. Gen. Vol. VII, p. 345, 1855, U. S.**

"A correspondence ensued between the captain general of Cuba and Mr. Trist, (United States consul), which terminated in a friendly disposition of the question, whether the seizure of the vessel in the port of Havana was a violation of the jurisdictional rights of Spain;" see **Atty. Gen. Vol. III, p. 406, 1839 U. S.**

When the American consul suspected the papers of a ship to be fraudulent he called upon a vessel of war of his nation to seize it; see **Atty. Gen. Vol. III, p. 405, 1839, U. S.**

By the act of 1856 a consul cannot exercise diplomatic functions without authorization from the president; see **Otterbourg's Case, 1869, U. S.**

"By some governments (a consul) is invested—in the absence of a minister or ambassador to represent them—with diplomatic powers;" see **Oscanyan v. Arms Company, 1880, U. S.**

ADMINISTRATIVE FUNCTIONS

Applications for patents must be sworn to; see **Atty. Gen. Vol. XX, p. 458, 1892, U. S.**

Duties of consul in sealing cars; see **Atty. Gen. Vol. XX, p. 31, 1891, U. S.**

An assignment of a patent purporting to have been executed before a consul general is sufficiently proved by the signature of the consul general and the seal of the United States consulate general; see **Matheson v. Campbell, 1895, U. S.**

(A.) Care of shipping

Consul is competent to appoint surveyors to make surveys of vessels and sales; see **Atty. Gen. Vol. VI, p. 617, 1854, U. S.**

Authority of consul to dispose of the effects of deserters; see **Atty. Gen. Vol. XIV, p. 520, 1875, U. S.**

Consul is in some respects the agent of the master in cases where he presides over the auction of the damaged goods; see **Waldron v. Coombe, 1810, G. B.**

Fees for receiving and delivering vessels registers prescribed by regulation of the president; see **Atty. Gen. Vol. XI, p. 73, 1866, U. S.**

For copy of consul's certificate annexed to certain affidavits in a suit for wages; see **Kammerhevie Rosenkrants, 1822, G. B.**

Protest against capture in neutral waters; see **Vrow Anna Catharina, 1803, G. B.**

That the consul's care of distressed seamen and their repatriation is primarily based upon the interests of the mercantile marine is instanced by the opinion of the attorney general; see **Atty. Gen. Vol. III, p. 683, 1841, U. S.**

A consul in China is entitled to fees collected for shipping and discharging seamen on foreign built vessel sailing under the American flag; see **Goldsborough v. United States, 1889, U. S.**

Case involving the consideration of the action of the Russian consul at Constantinople, who had appointed a curator of a wreck and three persons to assess expenses; see **Dent v. Smith, 1869, G. B.**

Official character of consul's acts when ordering survey of vessel and sale at auction—Like a trustee he is inhibited from acquiring an interest in the property; see **Riley v. The Obell Mitchell, 1861, U. S.**

"The consul appears very properly, to have employed Mr. Mitcheson as proctor and advocate in the cause, but, in form, as proctor and advocate for the respondent, and not of the consulate;" see **Townshend v. The Mina, 1868, U. S.**

(B.) Care of seamen

See **Snow v. Wope, 1855, U. S.; (The) Coriolanus, 1839, U. S.**

Consul often in league with captain against seamen; see **(The) Coriolanus, 1839, U. S.**

The attorney-general declared that in a judicial case in which there was a conflict between the department of state and the district court as to the meaning of the word "destitute" contain-

ed in the statute it should be settled by the courts; see **Atty. Gen. Vol. XIX, p. 25, 1887, U. S.**

Consul's action in caring for shipwrecked sailors. Case in which he obtains wages from master to provide for wants of crew; see **Atty. Gen. Vol. XIX, p. 22, 1887, U. S.**

Statutes for care of destitute seamen do not apply to Filipinos; see **Atty. Gen. Vol. XXIII, p. 402, 1901, U. S.**

That the consul's care of distressed seamen and their repatriation is primarily based upon the interests of the mercantile marine is instanced by the opinion of the attorney general; see **Atty. Gen. Vol. III, p. 683, 1841, U. S.**

Case where consul's action in imprisoning seamen is condemned—consul being, in his official character, intrusted with extending his protection to them; see **Shorey v. Rennell, 1858, U. S.**

Right of seamen to see the consul; see **Morris v. Cornell, 1843, U. S.**

Value of consular certificate as to facts relating to master's refusal to take sailors on board; see **Matthews v. Offley, 1837, U. S.**; also **(Certificates of Facts under heading of Judicial Functions).**

Repatriation of a minor sailor; see **Luscom v. Osgood, 1844, U. S.**

(C.) **Passports**

Value of a passport issued by a consul as evidence; see **Foster v. Davis, 1822, U. S.**

A passport is not evidence that individual has been in a foreign country; see **Foster v. Davis, 1822, U. S.**

JUDICIAL FUNCTIONS

Origin and basis for consul's exterritorial rights in certain countries; see **Atty. Gen. Vol. VII, p. 346-349, 1855, U. S.**

As between citizens and subjects of sending state consul "may exercise judicial powers;" see **Oscanyan v. Arms Company, 1880, U. S.**

(A.) **Consul's jurisdiction over crew** (see also Care of Shipping)

Extent to which the consul's action in declaring the entries of desertion, made by master, to be in accordance with the law of the sending state is conclusive; see **(The) Lilian M. Vigus, 1879, U. S.**

Authority of consuls in cases of deserters; see **(The) Lilian M. Vigus, 1879, U. S.**; **Atty. Gen. Vol. XII, p. 465, 1868, U. S.**

Right of seamen to see consul; see **Morris v. Cornell, 1843, U. S.**

Consul can determine who constitutes members of crew as between citizens of sending state; see **Atty. Gen. Vol. XI, p. 512, 1866, U. S.**

Duty of a consul to return a minor stowaway who became a sailor; see **Luscom v. Osgood, 1844, U. S.**

Advice of consul does not relieve master of responsibility for illegal act; see **Wilson v. (The) Mary, 1828, U. S.**

Where consul thrust sailor into jail to please captain, latter was not relieved of responsibility; see **Magee v. (The) Mose, 1831, U. S.**

Where consul secured soldiers to help master, libellant was awarded damages against master; see **Gardner v. Bibbins, 1833, U. S.**

Authority of consuls regarding imprisonment of members of crew; see **(The) William Harris, 1837, U. S.**; **Tingle v. Tucker, 1849, U. S.**; **Chester v. Benner, 1871, U. S.**; **(The) Coriolanus, 1839, U. S.**; **Jordan v. Williams, 1851, U. S.**

Consul's acts in disposing of wages; see **Hindsgaul v. The Lyman D. Foster, 1898, U. S.**

Retention of wages; see **Graves v. The W. F. Babcock, 1897, U. S.**

Consul cannot discharge seamen in cases of disability arising from wounds contracted in the service of the ship; see **Callon v. Williams, 1871, U. S.**

Consul's action in discharging seamen; see **Coffin v. Weld, 1871, U. S.**

Duties and responsibility of consul in discharge of seamen; see **Tingle v. Tucker, 1849, U. S.**

Authority of consul in discharging seamen and value of his certificate of the conditions under which it was done; see **Lamb v. Briard, 1848, U. S.**

Nature of consul's act in discharging seamen and the value of his certificate; see **Campbell v. Steamer Uncle Sam, 1856, U. S.**; **Hutchinson v. Coombs, 1825, U. S.**; **Jenks v. Cox, 1872, U. S.**

Gives copy of consul's certificate in the case of discharge of seamen; see **(The) Paul Revere, 1882, U. S.**

Jurisdiction of consuls in case of crime committed on board of a ship of the sending state; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

The discretionary power given by statute to consuls regarding the discharge of seamen is not reviewable except by some competent court; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

The jurisdiction of consuls over seamen is reciprocally granted because of the advantage to each country; see **Norberg v. Hillgreu, 1846, U. S.**

When the shipmaster is required to deposit the ship's register with the consul and the object of this deposit; see **Atty. Gen. Vol. IV, p. 390, 1845, U. S.**

Discussion of the obligations of American ships to bring home destitute seamen; see **Atty. Gen. Vol. IV, p. 185, 1843, U. S.**

French consul's jurisdiction limited to disputes on board ship not disturbing the police of the port; see **Atty. Gen. Vol. II, p. 379, 1830, U. S.**

The act of 1803 regarding the deposit of seamen's wages in the case of discharge abroad applies to a sailor too sick to continue the voyage; see **Atty. Gen. Vol. I, p. 594, 1820, U. S.**

The master of an American vessel, sold in a foreign country on account of being stranded is not obliged to deposit three months' wages for crew with the consul; see **Atty. Gen. Vol. I, p. 148, 1797, U. S.**

Consul's action in caring for shipwrecked sailors. Case in which he obtains wages from master to provide for wants of crew; see **Atty. Gen. Vol. XIX, p. 22, 1887, U. S.**

Case in which the district court of California decided that sailors were destitute and made owners of ship repay as wages money which had been paid to consul to furnish sailors with necessities; see **Atty. Gen. Vol. XIX, p. 24, 1887, U. S.**

"When a consul intervenes in a controversy between master and seamen, by mutual consent of the disputants, he acts as an arbitrator and not as consul;" see **Atty. Gen. Vol. XXI, p. 201, 1895, U. S.**

The master of a ship has no power to discharge crew on his mere authority without the intervention of a consul; see **Atty. Gen. Vol. VII, p. 349, 1855, U. S.**

"I am of the opinion that if Dowd was discharged by the consul-general because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and that some reasonable discretion is to be permitted to the consular authority in determining this extra allowance in reference to actual or anticipated ill-treatment and a discharge consequent thereon;" see **Atty. Gen. Vol. XXII, p. 212, 1898, U. S.**

Effect of the act of 1855 regarding the repatriation of seamen; see **Atty. Gen. Vol. VII, p. 268, 1855, U. S.**

When shipmasters are required to deposit register with consuls; see **Atty. Gen. Vol. V, p. 161, 1849, U. S.**

"The consul's certificate, obtained in the absence of the seaman, was not conclusive evidence of the fact of desertion;" see **Lewis v. Jewhurst, 1866, G. B.**

Case in which a consul does an injustice to seaman in discharging him—consul's decision ordinarily entitled to full credence but not when there was, according to the testimony, no hearing no judgment and no record; see **(The) Sachem, 1894, U. S.**

Court refused to take jurisdiction of case which consul had passed upon; and discussed occasions when jurisdiction will be taken; see **Townshend v. The Mina, 1868, U. S.**

Consul advised master to take back sailor who had been absent and when master refused certified that there was, in his belief, sufficient cause for a libel for wages and damages; see **Hayes v. J. J. Wickwire, 1870, U. S.**

(B.) Conditions in which courts of the receiving state will take jurisdiction over disputes between seamen and effect of consul's protest against the exercise of such jurisdiction

Requisites for courts taking jurisdiction; see **(The) Infanta, 1848, U. S.**

Effect of consul's opposition to the exercise of jurisdictions by courts of receiving state; see **(The) Havana, 1858, U. S.**

Whether the consent of ambassador or consul-general is necessary to allow court to take jurisdiction;" see **(The) Wilhelm Frederick, 1823, G. B.**

Jurisdiction granted by treaty to consuls is intended to furnish a proper remedy and admiralty court may, in its discretion, take jurisdiction when no consul of the sending state is within the district over which court exercises jurisdiction; see **(The) Amalia, 1880, U. S.**

British court has discretion whether it will exercise jurisdiction; see **(The) Nina, 1867, G. B.; (The) Leon XIII, 1883, G. B.**

Argument a contrairo might be made that the consent of consul is necessary; see **(The) Wilhelm Frederick, 1823, G. B.**

Court has discretion whether it will exercise jurisdiction and consul's protest cannot act as veto; see **(The) Leon XIII, 1883, G. B.; Weiberg v. (The) St. Oloff, 1790, U. S.; Bernard v. Creene, 1874, U. S.; (The) Nina, 1867, G. B.; (The) Belgenland,**

1884, U. S.; Bucker v. Klorkgeter, 1849, U. S.; (The) Topsy, 1890, U. S.

American court will take jurisdiction when an American citizen is one of the parties; see **(The) Alnwick, 1904, U. S.; The Falls of Keltie, 1902, U. S.; (The) Neck, 1905, U. S.**

Conditions under which court will take jurisdiction over suit of an alien for wages; see **Davis v. Leslie, 1848, U. S.**

Act imposing penalty for pre-payment of sailor's wages applies to foreign ships and foreign sailors; see **Patterson v. Bark Eudora, 1903, U. S.; (The) Troop, 1902, U. S.; (The) Alnwick, 1904, U. S.; (The) Kestor, 1901, U. S.**

Protest of foreign consul prevented courts taking jurisdiction in the case of the breakup of a voyage; see **Orr v. (The) Achsah, 1849, U. S.**

United States court took jurisdiction of libel for wages where crew desert after British second vice-consul had ordered them to go to work; see **(The) Lilian M. Vigus, 1879, U. S.**

Necessity of obtaining the consul's assent before court will take jurisdiction of certain suits; see **(The) Adolph, 1835, G. B.**

Court will not take jurisdiction against consul's protest in dispute for seamen's wages; see **Becherdass Ambaidass, 1871, U. S.; Robert Ritson, 1871, U. S.**

Authority of Danish consul where stipulation was made by captain to bind master to comply with the engagement entered into; see **(The) Willendson v. The Forsoket, 1801, U. S.**

Court indisposed to take jurisdiction except with consent of consul; see **(The) Courtney, 1810, G. B.**

British consul protests against exercise of jurisdiction and court refuses to take jurisdiction—Gives a copy of consul's protest; see **Saunders v. (The) Victoria, 1854, U. S.**

Court refused to take jurisdiction against the protest of the British consul; see **Lynch v. Crowder, 1849, U. S.**

Competence of vice-consul to decide questions between seamen.—Court refused to take jurisdiction; see **(The) New City, 1891, U. S.**

Court took jurisdiction at the request of the consul; see **(The) Sirius, 1891, U. S.**

Court accepts jurisdiction where no objection was made by consul; see **Waitshoair v. The Craigend, 1890, U. S.**

Consuls in Great Britain must be notified before the court exercises jurisdiction; see **(The) Nina, 1867, G. B.; (The) Leon XIII, 1883, G. B.; (The) Agincourt, 1877, G. B.; Golubchick, 1840, G. B.; (The) Herzogin Marie, 1861, G. B.**

Effect of consul's protest; see **(The) Herzogin Marie, 1861, G. B.**

Presence of consul when ships are visited by the local authorities; see **Atty. Gen. Vol. VIII, p. 88, 1856, U. S.**

Speaks of consul's consent prior to the courts taking jurisdiction in a matter concerning seamen; see **(The) Wilhelm Frederick, 1823, G. B.**

Court will not usually entertain suit of foreign seaman for wages when consul objects; see **(The) Franz and Elise, 1861, G. B.**

Court took jurisdiction over suit for seaman's wages against the request of consul on the ground that such action was likely to save time, expense, and perhaps further litigation; see **(The) Lady Furness, 1897, U. S.**

On the ground of comity district court heeded British consul's petition not to take jurisdiction; see **(The) Walter D. Wallet, 1895, U. S.**

A protest by a foreign consul against the prosecution of a suit for wages against a ship of his country does not deprive the court of its jurisdiction; but makes the exercise of that jurisdiction discretionary; see **(The) Octavie, 1863, G. B.**

(C.) Extent and limit of consular jurisdiction

Consular jurisdiction over ships and seamen; see **Harrison v. Vose, 1849, U. S.; (The) Infanta, 1848, U. S.; (The) Herzogin Marie, 1861, G. B.**

Basis and extent of consul's judicial power; see **Dainese v. Hale, 1875, U. S.**

Right of French consul to imprison members of crew; see **Dallemagne v. Moisan, 1905, U. S.**

Italian treaty gives consul jurisdiction in questions of dispute about wages, but perhaps does not extend to suits for injuries received; see **(The) Salomoni, 1886, U. S.**

Jurisdiction over seamen's disputes granted by treaty to consul does not extend to cases of homicide and felonies; see **Wildenhus's Case, 1886, U. S.**

American court allowed jurisdiction of consul over seamen even when American citizens; see **(The) Welhaven, 1892, U. S.; (The) Marie, 1892, U. S.**

Unless seaman is legally enrolled he is not a member of the crew and the consul has no jurisdiction over him; see **(The) Neck, 1905, U. S.**

Official acts of consul in the discharge of his duties in regard to seamen cannot be called in question by his home courts; see **Patch v. Marshall, 1853, U. S.**

Case in which consul has by the law of Brazil authority to sell damaged goods; see **Waldron v. Coombe, 1810, G. B.**

Right of a foreign consul, in the United States to sit as judge or arbitrator; see **(In re) Aubrey, 1885 U. S.**

Foreigners in the receiving state are bound to some extent by the acts of their own government and in shipping matters by the act of their consul; see **(The) Herzogin Marie, 1861, G. B.**

Consul is not a judicial officer; see **Waldron v. Coombe, 1810, G. B.**

Consuls have certain judicial functions; see **Barbuit's Case, 1737, G. B.**

Reasons why consul is better placed to look after the compliance with the legislation of the sending state; see **(The) Infanta, 1848, U. S.**

Consul's jurisdiction over members of crew limited to matters which form part of mariner's contract and duties; see **(The) Two Friends, 1799, G. B.**

American court refused to take jurisdiction in the case of a dispute between two French citizens who were referred to their consul; the latter being given jurisdiction by treaty; see **Goddard v. Luby, 1795, U. S.**

Case in which court declared that a consul had no right to receive fees when acting upon instructions from his government; see **De Lema v. Haldimand, 1824, G. B.**

Consideration was shown to the consul by making him an assessor; see **(The) Hanava, 1858, U. S.**

Court admits affidavits taken before the British consul in Russia because magistrates of Russia are not empowered to take affidavits; see **(In re) Daly, 1841, G. B.**

Presence of consul when ships are visited by the local authorities; see **Atty. Gen. Vol. VIII, p. 88, 1856, U. S.**

Consuls have no judicial authority; see **Atty. Gen. Vol. VIII, p. 77, 1856, U. S.**

Consuls have no judicial power but act as arbitrators in certain cases; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

Discussion of the jurisdiction of consuls; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

Consuls are not judicial officers; see **Atty. Gen. Vol. VIII, p. 381, 1857, U. S.**

Jurisdictions of consuls in case of crimes committed on board ship of sending state; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

Consul calls upon courts of receiving state to put into effect decree of sending state dispossessing master of ship; see **(The) Evangelistria, 1876, G. B.**

Officer who arrested master without direction of consul liable; see **Telefsen v. Fee, 1897, U. S.**

Jurisdiction of consul for the condemnation of a prize not valid; see **Flad Oyen, 1799, G. B.**

Consuls have no right to condemn prizes; see **Glass v. (The) Betsey, 1794, U. S.**

Consuls cannot perform marriages contrarily to law of the receiving state; see **Atty. Gen. Vol. VII, p. 3, 1854, U. S.**

The consul's action when caring for estates and looking after the interests of owners in prize proceedings is of the nature of surveillance and is not judicial; see **Atty. Gen. Vol. VIII, p. 101, 1856, U. S.**

The district court of California decided that sailors were destitute and made owners of ship repay as wages money which had been paid to consul to furnish sailors with necessities; see **Atty. Gen. Vol. XIX, p. 24, 1887, U. S.**

"When a consul intervenes in a controversy between master and seamen, by mutual consent of the disputants, he acts as an arbitrator and not as consul;" see **Atty. Gen. Vol. XXI, p. 201, 1888, U. S.**

"I am of the opinion that if Dowd was discharged by the consul-general because of unusual or cruel treatment, he is entitled to the one month's extra wages allowed by statute, and that some reasonable discretion is to be permitted to the consular authority in determining this extra allowance in reference to actual or anticipated ill-treatment and a discharge consequent thereon;" see **Atty. Gen. Vol. XXII, p. 212, 1898, U. S.**

It is clear that under this treaty system between these three Latin countries—Spain, Italy, and France—the consul is to exercise an exterritorial judicial power and to be the real administrator of the estate; but that disputes in which the country where the death occurred has some special interest, as where its own people or the people of a third country whom it should protect are concerned, are to be carved out of his jurisdiction and settled by the local judicial authority, leaving him to resume his functions when these special questions have been determined;" see **Atty. Gen. Vol. XXIII, p. 104, 1900, U. S.**

Spanish consuls in foreign countries are authorized to exer-

cise all the powers of courts of first instance, if permitted to do so by the laws of the country to which they are accredited; see **Atty. Gen. Vol. XXIII, p. 105 and p. 114, 1900, U. S.**

Conditions covering the issuance of letters rogatory and open commissions; see **Atty. Gen. Vol. XXIV, p. 70, 1902, U. S.**

Spanish consuls in Great Britain are instructed to obtain the testimony of voluntary witnesses by proceedings before a magistrate, but to attend to citations themselves; see **Atty. Gen. Vol. XXIII, p. 114, 1900, U. S.**

French consul's jurisdiction limited to disputes on board ship not disturbing the police of the port; see **Atty. Gen. Vol. II, p. 379, 1830, U. S.**

The president has no authority to extend the judicial power of foreign consuls on the ground of reciprocal treatment; see **Atty. Gen. Vol. II, p. 383, 1830, U. S.**

Marshals are not required by law to execute the sentence of a French consul, arising under the 12th article of the convention with France; see **Atty. Gen. Vol. I, p. 43, 1794, U. S.**

Case in which deserter was forcibly taken from the custody of the United States marshal while the latter was, upon the written order of the consul, delivering him to the master of the vessel—Court held that the law required the delivery to the consul and that acting under the direction of the consul the marshal was not engaged in the performance of a duty enjoined by law. Hence the defendants could not be punished for obstructing an officer in the performance of a duty enjoined by law; see **United States v. Kelly, 1901, U. S.**

Case in which a consul does an injustice to seaman in discharging him—Consuls decision ordinarily entitled to full credence, but not when there was according to the testimony no hearing, no judgment and no record; see **(The) Sachem, 1894, U. S.**

"We know of no law, federal or state, which vests national representatives with the power of serving judicial process of state courts on parties within their sphere of representative action;" see **Dumas, Interdiction of Joseph, 1880, U. S.**

Court praised consul, who did not attempt to interfere with the libellant's invocation of the interposition of the court but merely suggested the improbability that the court would entertain jurisdiction; see **Townshend v. The Mina, 1868, U. S.**

Consul advises master to take back sailor who had been absent and when master refused certified that there was in his belief sufficient cause for a libel for wages and damages; see **Hayes v. J. J. Wickwire, 1870, U. S.**

(D.) Jurisdiction of consul over crimes committed on board

Consul's protest against removal from ship of prisoners placed on board for conveyance to the United States to be tried; see **Tingle v. Tucker, 1849, U. S.**

Authority of consuls to send home seamen for trial; see **Matthews v. Offley, 1837, U. S.**

Consul sent member of crew home in irons for manslaughter; see **Smith v. Treat, 1845, U. S.**

Jurisdiction of consul over ship does not extend to homicide and felonies; see **(The) Belgenland, 1884, U. S.**

The Italian treaty does not perhaps give jurisdiction to consul in case of injuries received; see **(The) Salomoni, 1886, U. S.**

Jurisdiction of consuls over crew for crimes; see **Atty. Gen. Vol. VIII, p. 73, 1856, U. S.**

Jurisdiction of consuls in case of crime committed on board a ship of sending state; see **Atty. Gen. Vol. VIII, p. 382, 1857, U. S.**

(E.) Cases in which consuls granted jurisdiction by reason of treaty stipulations

See **(Ex parte) Newman, 1871, U. S.; Villeneuve v. Barrion, 1795, U. S.; Caignet v. Pettit, 1795, U. S.; (The) Elwin Kreplin, 1870, U. S.; (The) Burchard, 1890, U. S.; Atty. Gen. Vol. XII, p. 465, 1868, U. S.; Norberg v. Hillgren, 1846, U. S.**

Court refused to extend to Sweden by virtue of the most favored nation clause the rights of jurisdiction granted to French consuls in a special treaty; see **Weiberg v. (The) St. Oloff, 1790, U. S.**

FUNCTIONS IN CARING FOR THE GENERAL INTERESTS OF HUMANITY AND OF FRIENDLY STATES

Consul of a third state may, with the consent of his government, perform ordinary and routine duties of an American consul; see **Atty. Gen. Vol. XXII, p. 76, 1898, U. S.**

Where the consuls of a third power are entrusted with the interests of sending state their action is generally confined to extending protection and good offices; see **Atty. Gen. Vol. XXII, p. 76, 1898, U. S.**

FUNCTIONS IN NEUTRAL STATES IN TIME OF WAR

Dutch consul protests to Portugese authorities against Brit-

ish violation of Portugese neutrality; see **(The) Vrow Anna Catharina, 1803, U. S.**

Consul protests against the validity of a capture—gives a certificate to the owner that ship is still British; see **Betty Cathcart, 1799, G. B.**

Consul has no authority to grant a license to an enemy to exempt his property from capture; see **(The) Hope, 1813, G. B.; Benito v. Estenger, 1900, U. S.**

United States consul has no authority to grant license or exemption from capture; see **Rogers v. Amado, 1847, U. S.; (The) Hope, 1813, G. B.**

Condemnation of prizes by consuls; see **(The) Flad Oyen, 1799, G. B.**

Consular jurisdiction in matters of prize not of right; see **Glass v. The Betsey, 1794, U. S.**

Action of consul as recruiting agent for his government; see **Atty. Gen. Vol. VIII, p. 469, 1855, U. S.**

"Officious" letters of British consuls were not allowed to be read in court when the United States government felt that the British government was attempting to violate the neutrality laws of the United States; see **Atty. Gen. Vol. VIII, p. 469, 1855, U. S.**

Consuls have no right to enlist recruits contrarily to the spirit of the law or public policy of the receiving state; see **Atty. Gen. Vol. VII, p. 381, 1855, U. S.**

FUNCTIONS IN TERRITORY UNDER BELLIGERENT AUTHORITY

Consul has no authority to use his title or name to protect enemy's property from capture within the enemy's lines; see **Coppell v. Hall, 1868, U. S.**

Nature of the consul's action in prize proceedings; see **Atty. Gen. Vol. VIII, p. 101, 1856, U. S.**

A consul may represent the interests of his nationals in prize proceedings but his action is in the nature of surveillance; see **Atty. Gen. Vol. VIII, p. 101, 1856, U. S.**

Consul of Oldenburg charged with the duty of looking after prizes of nationals detained as prisoners of war and making the necessary intercessions before the proper tribunals to procure them their liberty; see **Viveash v. Becker, 1814, G. B.**

Extent to which a consul representing another consul withdrawn by reason of war is a consul of the belligerent state; see **Atty. Gen. Vol. XXII, p. 75, 1898, U. S.**

NATURE AND BASIS OF CONSULAR IMMUNITIES

Immunities which are necessary to perform consular functions; see **Marshall v. Cretico, 1808, G. B.**

Basis and extent of consular immunities; see **Arnold v. (The) United Insurance Company, 1800, U. S.; Valarino v. Thompson, 1853, U. S.**

The jurisdiction of consul over seamen is reciprocally granted because of the advantage to each country; see **Norberg v. Hillgren, 1846, U. S.**

Enumeration of consular immunities in the United States; see **Atty. Gen. Vol. VII, p. 21, 1854, U. S.**

In absence of any fixed rules of the law of nations as to whether the consul's immunities exempt him from certain burdens or duties the particular laws of the receiving state must determine; see **Atty. Gen. Vol. VIII, p. 171, 1856, U. S.**

Consuls have no immunities beyond persons coming to country in a private capacity, and in civil and criminal cases, they are equally subject to the laws of the receiving state; see **Atty. Gen. Vol. II, p. 725, 1835, U. S.**

The president has no authority to extend the judicial power of foreign consuls on the ground of reciprocal treatment; see **Atty. Gen. Vol. II, p. 383, 1830, U. S.**

"By all governments his [the consul's] representative character is recognized and for that reason certain exemptions and privileges are granted him;" see **Oscanyan v. Arms Company, 1880, U. S.**

(A.) Treaty rights

Immunities and privileges granted by treaty and interpretation of treaty provisions; see **Baiz v. Malo, 1899, U. S.; (The) Burchard, 1890, U. S.; Dallemagne v. Moisan, 1905, U. S.; (Succession of) Dufour, 1855, U. S.; (The) Elwine Kreplin, 1872, U. S.; (Matter of) Fattosini, 1900, U. S.; (The) General McPherson, 1900, U. S.; Goddard v. Luby, 1795, U. S.; Lanfear v. Ritchie, 1854, U. S.; (In re) Lobrasciano's Estate, 1902, U. S.; (In re) Logiorato's Estate, 1901, U. S.; (The) Marie, 1892, U. S.; (Ex parte) Newman, 1871, U. S.; Norberg v. Hillgren, 1846, U. S.; (In re) Peterson's Will, 1906, U. S.; (Succession of) Rabasse, 1895, U. S.; (The) Salomoni, 1886, U. S.; Telefsen v. Fee, 1897, U. S.; United States v. Motherwell, 1900, U. S.; Von Thodorovich v. Franz Josef Bene-**

ficial Association, 1907, U. S.; Weiberg v. The St. Oloff, 1790, U. S.; (The) Welhaven, 1892, U. S.; Wildenhus's Case, 1886, U. S.; (In re) Wyman, 1906, U. S.

The Spanish consul to secure the arrest of a deserter under the treaty must produce the original roll or corresponding document containing the names of the crew. A copy certified by the consul does not meet the requirements of the treaty, see **Atty. Gen. Vol. IX, p. 97, 1857, U. S.**

Nothing in the convention with France gives the consul freedom from suit in the American courts; see **Atty. Gen. Vol. I, p. 77, 1797, U. S.**

Marshals are not required by law to execute the sentence of a French consul, arising under the 12th article of the convention with France; see **Atty. Gen. Vol. I, p. 43, 1797, U. S.**

(B.) Most favored nation clause

See **(Matter of) Fattosine, 1900, U. S.; Weiberg v. (The) St. Oloff, 1790, U. S.; (In re) Logiorato's Estate, 1901, U. S.; Valarino v. Thompson, 1853, U. S.; (In re) Peterson's Will, 1908, U. S.; (In re) Wyman, 1906, U. S.**

Court refused to allow to Sweden by virtue of the most favored nation clause the jurisdiction granted French consuls by special treaty; see **Weiberg v. (The) St. Oloff, 1790, U. S.**

Columbian vice-consul cannot be compelled to attend as a witness by virtue of the most favored nation clause; see **Bias v. Malo, 1899, U. S.**

By virtue of the most favored nation clause Chilian consul cannot be compelled to testify; see **United States v. Trumbull, 1891, U. S.**

It is an unsettled question whether the provisions of the consular convention with France apply to nations enjoying the benefit of the most favored nation clause; see **Atty. Gen. Vol. VII, p. 385, 1855, U. S.**

(C.) Relative value of treaty provisions and municipal law when in conflict

Treaty cannot take away right of an American citizen to have recourse to his own courts; see **(The) Falls of Keltie, 1902, U. S.**

Privilege granted consuls declared to modify state laws; see **(Succession of) Rabasse, 1895, U. S.**

Treaty provisions supersede state laws and prevent the ap-

plication of tax imposed by latter; see **(Succession of) Dufour, 1855, U. S.**

State statutes must give way to provisions of treaty and the procedure followed by the court must be made to conform to such provisions in as far as possible; see **(Matter of) Fattosini, 1900, U. S.**

Question, whether alleged deserters should be given up to German consul by reason of the application of article 14 of the Convention of 1871 with Germany, should be submitted to the proper court for a judicial determination; see **Atty. Gen. Vol. XXV, p. 77, 1903, U. S.**

(D.) Enforcement of treaty rights

Case in which supreme court could not compel inferior court to decide in any other way leaving government with no means of enforcing treaty against the will of the inferior court; see **United States v. Judge Lawrence, 1795, U. S.**

Mixed international commission awarded damage because consul was not allowed to act as executor in accordance with the stipulation of the treaty; see **(In re) Vergil, 1857, U. S.**

Question whether alleged deserters should be given up to German consul by reason of the application of article 14 of the Convention of 1871 with Germany, should be submitted to the proper court for a judicial determination; see **Atty. Gen. Vol. XXV, p. 77, 1903, U. S.**

(E.) Incompetence to perform functions prohibited by receiving state

Sending state will not insist upon performance of duties which receiving state object to consul's fulfilling; see **(In re) Fawcus, 1884, G. B.**

Opinion in which it was implied that consul could not perform marriage which would be contrary to the law of the receiving state; see **Atty. Gen. Vol. VII, p. 32, 1854, U. S.**

Consul may not discharge functions contrarily to the law of the receiving state; see **Atty. Gen. Vol. VIII, p. 100, 1856, U. S.**

For consuls knowingly to attempt to contravene the spirit of the laws of the receiving state is a violation of its sovereign rights; see **Atty. Gen. Vol. VIII, p. 470, 1855, U. S.**

"Instead of this, it is bound, not only by every consideration of international comity, but of the strictest international law, to respect the sovereignty and regard the public policy of the United States;" see **Atty. Gen. Vol. VII, p. 381, 1855, U. S.**

Consul may be indicted for infractions of the municipal law

even when acting officially; see **Atty. Gen. Vol. VII, p. 384, 1855, U. S.**

"American consul has no authority except what may be expressly granted by a law of congress, and acknowledged by the government in whose jurisdiction he resides;" see **Atty. Gen. Vol. XIX, p. 197, 1888, U. S.**

Spanish consuls in foreign countries are authorized to exercise all the powers of courts of first instance, if permitted to do so by the laws of the country to which they are accredited; see **Atty. Gen. Vol. XXIII, p. 105 and p. 114, 1900, U. S.**

Consuls might acquire the right to solemnize marriage by the municipal act of any foreign government giving legality to a marriage within it so celebrated, in which case there would be nothing in our law or in our public policy to forbid a consul's officiating in that relation; secondly, perhaps, specially by treaty, or generally by act of congress; see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

Consul is legally incapable of solemnizing marriage without authority of the local government; see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

(F.) Right of consul to waive the enjoyment of immunities

Immunity from arrest when given is to protect the interests of the sending state and cannot be waived by the consul, nor is it dependent upon an individual's belief that he is consul or upon his acting *bona fide* as consul. The grant of the immunity is dependent upon its usefulness to the sending state; see **Marshall v. Critico, 1808, G. B.**

Consul cannot waive privileges of jurisdiction in federal court; see **Miller v. Van Loben Sells, 1885, U. S.; Wilcox v. Luco, 1896, U. S.; 45 Pac. Rep. 676 was reversed in 50 Pac. Rep. 758.**

Consul may not renounce privilege advantageous to his government; see **Barbuit's Case, 1737, G. B.; Davis v. Packard, 1833, U. S.; Boers v. Preston, 1883, U. S.; Valarino v. Thompson, 1853, U. S.**

Consul may waive his right to have a suit against him reviewed by federal court; see **Wilcox v. Luco, 1897, U. S.**

IMMUNITIES MAKING FOR THE RESPECT OF THE CONSULAR OFFICE

Consul was made an assessor; see **(The) Havana, 1858, U. S.**

Consul in charge of business of legation not necessarily entitled to diplomatic immunities; see **(In re) Baiz, 1889, U. S.**

National courtesy will prompt the courts of the receiving state to hesitate in making the consul's official acts the subject of comment; see **Norberg v. Hillgren, 1846, U. S.**

Procedure to be followed by a foreign consul who wishes to appeal to the United States federal courts to punish insult offered to him; see **Atty. Gen. Vol. I, p. 43, 1794, U. S.**

Insults offered by a tumultuous crowd to the consul before his residence are not covered by the act of April 30, 1790, which punishes for any infraction of the laws of nations, by offering violence to the person of an ambassador or other public ministers as consul is not a public minister; see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

FORCIBLE ASSISTANCE GIVEN TO THE CONSUL BY AUTHORITIES OF THE RECEIVING STATE

Procedure to be followed by foreign consul who wishes to appeal to the United States federal courts to punish insult offered to him; see **Atty. Gen. Vol. I, p. 43, 1794, U. S.**

Court declares that it has no authority to compel witnesses to testify before Spanish consul; see **Spanish Consul's Petition, 1867, U. S.**

Case in which deserter was forcibly taken from the custody of the United States marshal while the latter was, upon the written order of the consul, delivering him to the master of the vessel. Court held that the law required the delivery to the consul and that acting under the direction of the consul the marshal was not in the performance of a duty enjoined by law. Hence the defendants could not be punished for obstructing an officer in the performance of a duty enjoined by law; see **United States v. Kelly, 1901, U. S.**

PERSONAL INVIOLABILITY OF CONSUL

(A.) Protection from assault

Where an individual is pursued for an assault it is not a case "affecting consuls" in the meaning of the constitution of the United States; see **United States v. Ortega, 1826, U. S.**

Filipino was imprisoned for striking the Spanish consul; see **United States v. Lucinario, 1906, U. S.**

Consul must look for the protection of his person and property to the laws of the state in which he resides; see **Atty. Gen. Vol. XIX, p. 16, 1887, U. S.**

Consuls are not public ministers but enjoy certain privileges such as for safe conduct; see **Viveash v. Becker, 1814, G. B.**

Insults offered by a tumultuous crowd to the consul before his residence are not covered by the act of April 30, 1790, which punishes for any infraction of the laws of nations, by offering violence to the person of an ambassador or other public ministers as consul is not a public minister; see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

(B.) Consular domicile

Consul does not lose his domicile in sending state; see **Sharpe and Sharpe v. Crispin, 1869, G. B.; Niboyet v. Niboyet, 1878, G. B.**

An individual domiciled in the receiving state does not lose his domicile by becoming a consul; see **Sharpe and Sharpe v. Crispin, 1869, G. B.**

Despatched consuls retain their domicile in the sending state; see **Arnold v. United Insurance Company, 1800, U. S.**

Consul general for Scotland appointed deputies. Court declared that if the deputies were now acting it would be a "strong circumstance to affect him with a British residence, as long as there are persons acting in an official station here, and deriving their authority from him;" see **Dree Gebroeders v. Vandyk, 1802, G. B.**

(C.) Jurisdiction of the courts of the receiving state in the case of consul's official acts

Reasons why the courts of receiving state should not decide as to the fulfillment by the consul of the regulations enacted by the sending state; see **(The) Infanta, 1848, U. S.**

British consul claimed that his official acts should not be examined by the courts of the receiving state; see **Saunders v. The Victoria, 1854, U. S.**

The consul is not civily responsible for an official act; see **Jones v. Le Tombe, 1798, U. S.**

The American courts will not call in question the official acts of a British consul respecting the crew and vessel done in a foreign port. In this case the seaman concerned was an American; see **Patch v. Marshall, 1853, U. S.**

Consul acting in an official capacity refused to deliver up papers of the ship, Betty Cathcart, and the court refused to compel him to do so; see **(The) Betty Cathcart, 1799, G. B.**

National courtesy will prompt the courts of the receiving

state to hesitate in making the consul's official acts the subject of comment; see **Norberg v. Hillgren, 1846, U. S.**

Consuls may be indicted for infractions of the municipal law even when acting officially; see **Atty. Gen. Vol. VII, p. 384, 1855, U. S.**

Consul is subject to the jurisdiction of the receiving state even when acting officially; see **Atty. Gen. Vol. I, p. 78, 1797, U. S.**

Consul not required to give bail when a suit is brought against him for an official act in which he has acted as commercial agent of his country; see **Atty. Gen. Vol. I, p. 78, 1797, U. S.**

Though it is well settled in the United States as in Great Britain that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States, nevertheless the executive cannot interpose with the judiciary proceedings between an individual and the official holding the commission; see **Atty. Gen. Vol. 1, p. 81, 1797, U. S.**

Although the transaction was of a public nature concerning the republic of France and the consul-general acted as the commercial agent of the republic, "yet the President of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice;" see **Atty. Gen. Vol. I, 78, 1797, U. S.**

(D.) Protection of individuals of the receiving state against acts of consuls

Case in which consul was sued for false imprisonment because of illegal arrest secured by consul; see **Castro v. De Uriarte, 1883, U. S.**

United States court will not call in question the official act of British consul in foreign port even when American seamen are concerned; see **Patch v. Marshall, 1853, U. S.**

Right of individual to demand the performance of certain services of a consul; see **De Lema v. Haldimand, 1824, G. B.**

"It is clear that under this treaty system between these three Latin countries—Spain, Italy, and France—the consul is to exercise an exterritorial judicial power and to be the real administrator of the estate; but that disputes in which the country where the death occurred has some special interest, as where its own people or the people of a third country whom it should protect are concerned, are to be carved out of his jurisdiction and set-

tled by the local judicial authority, leaving him to resume his functions when these special questions have been determined;" see **Atty. Gen. Vol. XXIII, p. 104, 1900, U. S.**

(E.) Protection of individuals of the sending state against acts of consul

Foreign consul may be sued for fees illegally collected; see **Lorway v. Lousada, 1866, U. S.**

Receiving state is not bound to protect individuals against acts of their government and consuls; see **(The) Herzogin Marie, 1861, G. B.**

Courts of the United States are not required to protect aliens against acts of their own consul; see **(In re) Lobrasciano's Estate, 1902, U. S.**

Determination of what constitutes an official act; see **Mosby v. United States, 1888, U. S.**

The consent of consul necessary in certain cases to prosecute in the courts of the receiving state; see **(The) Infanta, 1848, U. S.**

It is the duty of the United States to protect the public against the exercise of consular duties, even voluntary ones, by any person who has not been authorized to do so by congress; see **Atty. Gen. Vol. XX, p. 93, 1891, U. S.**

The remedy of individuals suffering from wrongs or shortcomings of a consul of the United States is against the consul and the sureties on his bond; see **Atty. Gen. Vol. XIX, p. 24, 1887, U. S.**

INVIOLABILITY OF CONSULATE

(A.) Inviolability of archives

American court refused to compel French consul to give up papers of ship which had been illegally condemned; see **(The) Betty Cathcart, 1799, G. B.**

Inviolability of archives; see **Kessler v. Best, 1903, U. S.; (In re) Dillon, 1854, U. S.**

RIGHT TO COMMUNICATE WITH AUTHORITIES AND TO HAVE SUCH COMMUNICATION TREATED WITH DUE CONSIDERATION

"Officious" letters of British consuls were not allowed to be read in court when the United States government felt that the British government was attempting to violate the neutrality laws of the United States; see **Atty. Gen. Vol. VIII, p. 469, 1855, U. S.**

"Many cogent reasons dictate that we should insist on the right to address the colonial or provincial government;" see **Atty. Gen. Vol. VII, p. 344, 1855, U. S.**

When no diplomatic representative is present a consul should have the right to place himself in direct communication with the political authority of such government; see **Atty. Gen. Vol. VII, p. 344, 1855, U. S.**

"We have or may have a minister of whatever title, who is of course, by public law, superior in rank to consuls, and their medium of communication with the government;" see **Atty. Gen. Vol. VII, p. 275, 1855, U. S.**

"A correspondence ensued between the captain general of Cuba and Mr. Trist, (United States consul), which terminated in a friendly disposition of the question, whether the seizure of the vessel in the port of Havana was a violation of the jurisdictional rights of Spain;" see **Atty. Gen. Vol. III, p. 406, 1839, U. S.**

IMMUNITIES TO PREVENT INTERRUPTION[1]

It is for the executive and not for the courts to determine who are public ministers; see **(In re) Baiz, 1889, U. S.**
Procedure to be followed by consul who wishes to plead immunity from jurisdiction; see **Atty. Gen. Vol. I, p. 407, 1820, U. S.**

(A.) Consuls are subject to the jurisdiction of the courts of the receiving state

Consuls are subject to the territorial jurisdiction; see **Barbuit's Case, 1737, G. B.; Atty. Gen. Vol. VII, p. 21, 1854, U. S.**

Consuls have no immunity from criminal prosecution; see **Commonwealth v. Kosloff, 1816, U. S.; United States v. Ravara, 1793, U. S.**

A consul was declared to be subject to the jurisdiction of the receiving state in certain cases—A contrario they would seem to enjoy a certain exemption in others; see **Arnold v. (The) United Insurance Company, 1800, U. S.**

Court takes jurisdiction in cases where consul brings suit for fees; see **De Lema v. Haldimand, 1824, G. B.**

Consuls are subject to the jurisdiction of the courts of the receiving state; see **State v. De La Foret, 1820, U. S.**

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[1] Exemptions from, and modifications of, the legal procedure accorded to consuls so as not to hinder the discharge of their functions.

In the case of a civil individual suit, "of which the judiciary has possession, the president has no authority to interpose in the case, either by arresting the proceedings, by punishing the plaintiff, or even ordering a prosecution against him, unless the step which he has taken be in violation of some law or statute;" see **Atty. Gen. Vol. I, p. 407, U. S.**

Consul subject to the jurisdiction of the receiving state civilly and criminally; see **Atty. Gen. Vol. I, p. 410, 1820, U. S.**

Consuls have no immunities beyond persons coming to country in private capacity and in civil and criminal cases, they are equally subject to the laws of the receiving state; see **Atty. Gen. Vol. II, p. 725, 1835, U. S.**

Nothing in the convention with France gives the consul freedom from suit in the American courts; see **Atty. Gen. Vol. I, p. 77, 1797, U. S.**

Although the transaction was of a public nature concerning the republic of France and the consul-general acted as the commercial agent of the republic, "yet the president of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice;" see **Atty. Gen. Vol. I, p. 78, 1797, U. S.**

Consul is subject to jurisdiction of receiving state even when acting officially; see **Atty. Gen. Vol. I, p. 78, 1797, U. S.**

Though "it is well settled in the United States as in Great Britain that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States," nevertheless the executive cannot interpose with the judiciary proceedings between an individual and the official holding the commission; see **Atty. Gen. Vol. I, p. 81, 1797, U. S.**

Procedure to be followed by consul who wishes to plead immunity from jurisdiction; see **Atty. Gen. Vol. I, p. 407, 1820, U. S.**

Lord Ellenborough thinks that as consul may appoint vice-consuls to perform his functions no great inconvenience would result from his imprisonment; see **Viveash v. Becker, 1814, G. B.**

Consul not entitled to privilege from arrest; see **Viveash v. Becker, 1814, G. B.**

(B.) Liability of consuls to arrest

Consuls are not public ministers and are subject to arrest for debt; see **Viveash v. Becker, 1814, G. B.**

Discussion of consul's liability to arrest for civil process; see **Clarke v. Cretico, 1808, G. B.**

Mansfield says consul's duties are not such as can be performed in prison; see **Clarke v. Cretico, 1808, G. B.**

Lord Ellenborough seems to infer a contrario that the consul-general is entitled to immunity from arrest; see **Marshall v. Cretico, 1808, G. B.**

Immunity from arrest when given is to protect the interest of sending state and cannot be waived by consul—it is not dependent upon individuals belief that he is a consul nor upon his acting *bona fide* as such—the grant of the immunity is dependent upon its use to the sending state; see **Marshall v. Cretico, 1808, G. B.**

(C.) Giving of testimony

See **United States v. Trumbull, 1891, U. S.; Bias v. Molo, 1899, U. S.; (In re) Dillon, 1854, U. S.**

Consul cannot be compelled to give testimony in court contrary to the terms of the treaty; see **(In re) Dillion, 1854, U. S.; Bias v. Malo, 1899, U. S.**

"Officious" letters of British consuls were not allowed to be read in court when the United States government felt that the British government was attempting to violate the neutrality laws of the United States; see **Atty. Gen. Vol. IX, p. 469, 1860, U. S.**

"It is clear that he (consul) has no right, by any rule of public law, or international comity, to be heard in the case by the court, otherwise than as a witness, whether enforced or voluntary;" see **Atty. Gen. Vol. VIII, p. 470, 1855, U. S.**

(D.) To what courts consuls in the United States are subject.

Exemption from jurisdiction of state courts is a privilege of the United States government and may not be waived by the consul or his government; see **Valarino v. Thompson, 1853, U. S.**

The effect of the jurisdiction of federal courts is that the consul's case remains within the control of the general government which may deal with it according to the convenience or the exigencies of its foreign policy, without impediment from the authority of any of the individual states of the Union; see **Atty. Gen. Vol. VII, p. 384, 1855, U. S.**

Case in which the immunity granted a consul may not be waived by the consul and reasons why consul may not waive the immunity; see **Marshall v. Cretico, 1808, G. B.**

It does not seem to be decided whether the privilege of jurisdiction in the federal courts extends to citizens of the United States, consuls for foreign states; see **Atty. Gen. Vol. VIII, p. 172, 1856, U. S.**

Thorough discussion of the jurisdiction of state and federal courts over consuls; see **Mannhardt v. Soderstrom, 1806, U. S.**

In a case where a civil suit was brought against a consul he could plead to jurisdiction of court and bring the question, if he chose, before the supreme court of the nation; see **Atty. Gen. Vol. I, p. 407, 1820, U. S.**

Discussion of the jurisdiction of the federal courts over consuls; see **Cohens v. Virginia, 1821, U. S.**

(E.) Cases in which state courts were declared to have jurisdiction over suits concerning consuls

State courts have jurisdiction over suits brought by a consul; see **Sagory v. Wissman, 1868, U. S.**

State courts have jurisdiction over consuls; see **State v. De la Foret, 1820, U. S.**

State courts have jurisdiction over consuls and the federal courts' jurisdiction is not exclusive; see **Scott v. Hobe, 1900, U. S.** The jurisdiction of the state courts in criminal suits and extradition proceedings; see **(In re) Iasigi, 1897, U. S.**

State courts have jurisdiction as well as federal courts; see **Redmond v. Smith, 1899, U. S.**

Federal courts do not, since the repeal of the 8th clause of section 711 of revised statutes, have exclusive jurisdiction over consuls and civil suits may be brought against them in state courts; see **De Give v. Grand Rapids Furniture Company, 1894, U. S.**

State courts have concurrent jurisdiction over consuls since 1875; see **Wilcox v. Luco 50 Pac. Rep. 758, 1897, U. S.**

Discussion of the jurisdiction of state and federal courts over consuls; see **Cohens v. Virginia, 1821, U. S.**

If constitution were interpreted to give supreme court jurisdiction in cases of crimes committed by consuls it would defeat the clause directing "that all crimes shall be tried in the state where they are committed;" see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

State courts are not incompetent when a consul, who is summoned as a garnishee is put in the attitude of a defendant; see **Kidderlin v. Meyer, 1838, U. S.**

(F.) State courts do not have jurisdiction over consuls

See **Mannhardt v. Soderstrom, 1806, U. S.; Saint Luke's Hospital v. Barclay, 1855, U. S.; Davis v. Packard, 1833, U. S.; Boers v. Preston, 1883, U. S.; Sartori v. Hamilton, 1832, U. S.; Valarino v. Thompson, 1853, U. S.; McKay v. Garcia, 1873, U. S.**

State courts have no jurisdiction over consuls ever since 1875; see **Wilcox v. Luco, 45 Pac. Rep. 676 (reversed in Wilcox v. Luco, 50 Pac. Rep. 758), 1896, U. S.**

Competence of state courts to continue suit when defendant has become consul since its commencement; see **Coppell v. Hall, 1869, U. S.**

Consuls are not subject to state courts; see **Dissenting Opinion in State v. De la Foret, 1820, U. S.**

Consul not subject to jurisdiction in state courts—Procedure to be followed to obtain relief when suit has been brought against him in a state court; see **Durand v. Halbach, 1835, U. S.; Davis v. Packard, 1833, U. S.**

Consul cannot be examined in a state court for a judgment debtor and he cannot be attached for refusal to obey an order for examination; see **Griffin v. Dominguez, 1853, U. S.**

One object of the provision of the constitution regarding suits affecting consuls "was to prevent the harassing of foreign ministers and consuls in the state courts;" see **(In the Matter of) Ayoinena, 1848, U. S.**

State courts do not have jurisdiction of suits affecting consuls; see **(In the Matter of) Ayoinena, 1848, U. S.**

(G.) Federal courts have jurisdiction over consuls

See **Bixby v. Janssen, 1869, U. S.; Froment v. Duclos, 1887, U. S.; United States v. Ravara, 1793, U. S.; Graham v. Stucken, 1857, U. S.; Saint Luke's Hospital v. Barclay, 1855, U. S.; Boers v. Preston, 1883, U. S.; Cohens v. Virginia, 1821, U. S.; Atty. Gen. Vol. VII, p. 22, 1854, U. S.**

A case against a person for assaulting a consul, is not a case "affecting consuls" under the constitution; see **United States v. Ortega, 1826, U. S.**

Federal court is competent even when consul is co-defendant; see **Valarino v. Thompson, 1853, U. S.**

"On the other hand, the constitution accords to every foreign consul the privilege to bring suit in the federal courts;" see **Atty. Gen. Vol. VIII, p. 172, 1856, U. S.**

Inferior federal courts are not excluded from jurisdiction in cases concerning a consul; see **Gittings v. Crawford, 1838, U. S.**

Jurisdiction of the circuit court over consuls; see **Pooley v. Luco, 1896, U. S.**

(H.) Right of consul to waive jurisdiction of federal courts in cases affecting consuls

A consul may waive his right to have suit against him reviewed by the federal court; see **Wilcox v. Luco, 1896, U. S.**

A consul may waive his exemption from the jurisdiction of the state courts but after pleading to the merits he cannot avail himself of the privilege by affidavit upon special motion; see **Flynn v. Stoughton, 1848, U. S.**

Consul may waive right of jurisdiction by federal courts; see **Hall v. Young, 1825, U. S.**

Consul's privilege of jurisdiction by the federal courts is not waived by failure to plead his exemption from the jurisdiction of the state courts; see **Miller v. Van Loben Sells, 1885, U. S.**

Where the fact that the defendant is a consul does not appear upon the record, it is a waiver of the right to jurisdiction by the federal court; see **Hall v. Young, 1825, U. S.**

Exemption of consul from liability to be sued in a state court is not a privilege of the consul or of his sovereign, but of the United States government, and, therefore, it cannot be renounced by the consul; see **Valarino v. Thompson, 1853, U. S.**

Reasons why consul may not waive immunities; see **Marshall v. Critico, 1808, G. B.**

The exemption from suit in state courts is not the consul's personal privilege—It belongs to the United States and cannot be waived by any act or default of the consul; see **Griffin v. Dominguez, 1853, U. S.**

IMMUNITIES OF CONSULAR AGENTS[1]

Consular agents (trading or merchant consuls) have no right to a favored treatment in matters relating to their mercantile transactions; see **(The) Charlotte, 1804, G. B.; Albretcht v. Sussman, 1813, G. B.; (The) Indian Chief, 1800, G. B.; (The) Pioneer, 1863, U. S.; (The) Josephine, 1801, G. B.; (The) President, 1804, G. B.; (The) Falcon, 1805, G. B.; Scott v. Hobe, 1900, U. S.**

[1] Consular agent (agent consulaire) is the term recommended by the Institute of International Law to designate consuls having some occupation besides their consular duties.

Reasons for differentiating the immunities accorded consuls and consular agents; see **Atty. Gen. Vol. VIII, p. 174, 1856, U. S.**

Exemption from service on juries; see **Atty. Gen. Vol. VIII, p. 169, 1856, U. S.**

Exemption from military duty and service in the militia; see **Atty. Gen. Vol. VIII, p. 169, 1856, U. S.**

It does not seem to be decided whether the privilege of jurisdiction in the federal courts extends to citizens of the United States, consuls for foreign states; see **Atty. Gen. Vol. VIII, p. 172, 1856, U. S.**

Meaning of term "Consular Agent;" see **Atty. Gen. Vol. VII, p. 246 and 262, 1855, U. S.**

ORGANIZATION

(A.) Appointment

Disadvantages of employing consular agent; see **(The) Coriolanus, 1839, U. S.**

Advantages of employing consular agents; see **Atty. Gen. Vol. VII, p. 262, 1855, U. S.**

"But their appointment remained unchangeably one of the organic powers of the executive; derived from the constitution, not from any act of congress;" see **Atty. Gen. Vol. VII, p. 249, 1855, U. S.**

Advantages and disadvantages of employing consular agents; see **Atty. Gen. Vol. VIII, p. 174, 1856, U. S.**

"So when, by the late convention with France, or any other, it is said, in words, that officers with consular functions and rights, vice-consuls and consular agents, may be appointed by the consul, it means appointed by the secretary of state on the presentation of the consul, and removable by the same authority;" see **Atty. Gen. Vol. VII, p. 276, 1855, U. S.**

Statutes regarding appointment of clerks are to be considered as recommendations and not commands; see **Atty. Gen. Vol. VII, p. 265, 1855, U. S.**

American consuls have not authority to appoint vice-consuls and consular agents; see **Atty. Gen. Vol. VII, p. 276, 1855, U. S.**

Commercial agents, character of and reasons for appointing; see **Atty. Gen. Vol. VII, p. 247, 1855, U. S.**

Lord Ellenborough thinks that as consul may appoint vice-consuls to perform his functions no great inconvenience would result from his imprisonment; see **Viveash v. Becker, 1814, G. B.**

"I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person cannot possibly have any virtue in him as a public officer;" see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

Appointment of public ministers; see **Atty. Gen. Vol. VII, p. 186, 1855, U. S.**

Expenses of the funeral of consul to the Barbary States paid by son acting as consul are a lawful charge on the contingent fund. If those expenses were proper to be incurred, and were incurred for the public service they ought to be repaid; see **Atty. Gen. Vol. II, p. 523, 1832, U. S.**

Consul must take oath preceding entry upon duties to be entitled to salary. This oath cannot be taken before a consul of another state; see **Otterbourg's Case, 1869, U. S.**

Consul appoints a successor and asks the *chargé d'affaires* to ask for his exequatur; see **Sturgis v. Slacum, 1836, U. S.**

Consul general for Scotland appointed deputies. Court declared that if the deputies were now acting it would be a "strong circumstance to affect him with a British residence, as long as there are persons acting in an official station here, and deriving their authority from him;" see **Dree Gebroeders v. Vandyk, 1802, G. B.**

(B.) Salary

See **Fees; Regulations concerning fees.**

American consuls may not receive presents, even photographs; see **Atty. Gen. Vol. XXIV, p. 118, 1903, U. S.**

Salary of three months paid to widow of American consuls dying in office; see **Atty. Gen. Vol. II, p. 521, 1832, U. S.**

Claim of vice-consul for salary of consul who was absent on leave; see **Wilbor v. United States, 1902, U. S.**

Case in which court declared that consul has no right to receive fees when acting upon instructions from his government; see **De Lema v. Haldimand, 1824, G. B.**

Salary of vice-consul when consul is absent; see **Atty. Gen. Vol. VII, p. 261, 1855, U. S.**

Consul not entitled to extra pay for discharging the duties of a second office to which he had not received a regular appointment as authorized by law; see **Atty. Gen. Vol. IX, p. 507, 1860, U. S.**

Son of consul who acts as *de facto* consul whose acts have

been recognized by his government should receive the compensation allowed by law; see **Atty. Gen. Vol. II, p. 522, 1832, U. S.**

Power to provide salary of consul in congress and an advance in salary made by executive uncollectible; see **Byers v. United States, 1867, U. S.**

United States is not responsible for contract made by consul for services. An appointment is necessary to entitle to the payment of a salary; see **Azogue v. United States, 1891, U. S.**

American consul removed from office before the end of the fiscal year is only entitled to retain a part of the fees collected proportional to the part of the fiscal year during which he has held office; see **Marston v. United States, 1896, U. S.**

(C.) Consular hierarchy

Rights and duties of consul-general; see **Atty. Gen. Vol. VII, p. 275, 1855, U. S.**

Enumeration and definition of various classes of consular officers; see **Atty. Gen. Vol. VII, p. 247, 1855, U. S.**

"We have or may have a minister, of whatever title, who is of course, by public law, superior in rank to consuls, and their medium of communication with the government;" see **Atty. Gen. Vol. VII, p. 275, 1855, U. S.**

Special character and immunities of consular agent; see **Marshall v. Critico, 1808, G. B.**

Reason for differentiating the immunities accorded consuls and consular agents; see **Atty. Gen. Vol. VIII, p. 174, 1856, U. S.**

Competence of commercial agent to take acknowledgment under the law of Pennsylvania; see **Moore v. Miller, 1892, U. S.**

Officers competent to perform consular duties; see **Welsh v. Hill, 1807, U. S.**

Duties of vice-consul; see **(In re) Herres, 1887, U. S.**

Duties of deputy consul; see **(In re) Herres, 1887, U. S.**

Deputy consul may take acknowledgment or a power of attorney; see **Stewart v. Linton, 1902, U. S.**

Acts which a consul may perform by procuration; see **Atty. Gen. Vol. VIII, p. 102, 1856, U. S.**

Consular agents, (or merchant consuls) incompetent to give certificates of certain matter relating to seamen; see **(The) Coriolanus, 1839, U. S.**

President has power by statute to prescribe a tariff of fees for official services only. He also has the power to declare what are official services. Hence when he perscribes a certain fee for

a service it is to be considered as declared official; see **Atty. Gen. Vol. XIX, p. 198, 1888, U. S.**

"The suggestion and the request, coming from the department of state, were practically equivalent to a direction or command;" see **Leavitt v. United States, 1888, U. S.**

Power to provide salary of consul is in congress and an advance in salary made by executive uncollectible; see **Byers v. United States, 1887, U. S.**

A vice and deputy consul has authority to acknowledge a power of attorney; "for while he acted in that capacity he was entitled to exercise the authority vested by law in the consul himself;" see **Brown v. Landon, 1883, U. S.**

Consul general for Scotland appointed deputies. Court declared that if the deputies were now acting it would be a "strong circumstance to affect him with a British residence, as long as there are persons acting in an official station here, and deriving their authority from him;" see **Dree Gebraeders v. Vandyk, 1802, G. B.**

Meaning of terms "Commercial Agent" and "Consular Agent;" see **Schunior v. Russell, 1892, U. S.**

Consular agent is the representative of the consul; see **Gould v. Staples, 1881, U. S.**

Consular agents are not consuls or commercial agents within the meaning of the laws regulating the consular system of the United States; see **Atty. Gen. Vol. XII, p. 98, 1866, U. S.**

Consul is not responsible for money paid to clerk under direction of state department; see **United States v. Owen, 1891, U. S.**

"The consuls, like other officers of the United States are subject to the regulations issued by the proper head of department;" see **Atty. Gen. Vol. VII, p. 249, 1854, U. S.**

Advantages and disadvantages of employing consular agents; see **Atty. Gen. Vol. VIII, p. 174, 1856, U. S.**

Consul may act by procuration where caring for estates. etc.; see **Atty. Gen. Vol. VIII, p. 102, 1856, U. S.**

The notarial powers of a provisional British consul; see **(In re) Darling, 1845, G. B.**

Enumeration of the different classes and varieties of consular officers; see **Atty. Gen. Vol. VII, p. 248, 1855, U. S.**

Character of, and reasons for appointing commercial agents; see **Atty. Gen. Vol. VII, p. 247, 1855, U. S.**

Meaning of term "Consular Agent;" see **Atty. Gen. Vol. VII, p. 246 and 262, 1855, U. S.**

(D.) Consular regulations

Power of the president to make regulations to govern consuls; see **Gould v. Staples, 1866, U. S.**

"They (consuls) like other executive officers of the United States are subject to regulations issued by the proper head of department;" see **Atty. Gen. Vol. VII, p. 249, 1855, U. S.**

Power of the president to determine what constitutes an official fee; see **Atty. Gen. Vol. XXIV, p. 672, 1902, U. S.; United States v. Mosby, 1889, U. S.**

American consuls may not receive presents; even photographs; see **Atty. Gen. Vol. XXIV, p. 118, 1903, U. S.**

The department of state must in case of doubt determine what constitutes an official fee and not the treasury department; see **United States v. Badeau, 1887, U. S.**

No service is unofficial which consul has no right to refuse; see **Atty. Gen. Vol. XXIV, p. 672, 1903, U. S.**

Where consul collects extra wages from master the secretary of the treasury can only review the arithmetical accuracy of account; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

Statutes regarding appointment of clerks are to be considered as recommendations and not commands; see **Atty. Gen. Vol. VII, p. 265, 1855, U. S.**

The attorney-general declared that in a judicial case in which there was a conflict between the department of state and the district court as to the meaning of the word "destitute" contained in the statute it should be settled by the courts; see **Atty. Gen. Vol. XIX, p. 25, 1887, U. S.**

The president has power by statute to prescribe a tariff of fees for official services only. He also has the power to declare what are official services. Hence when he perscribes a certain fee for a service it is to be considered as declared official; see **Atty. Gen. Vol. XIX, p. 198, 1888, U. S.**

"American consul has no authority except what may be expressly granted by a law of congress, and acknowledged by the government in whose jurisdiction he resides;" see **Atty. Gen. Vol. XIX, p. 197, 1888, U. S.**

"Fees for certificates to consular invoices may be rendered official by executive order, and specially included in the tariff of official fees;" see **Atty. Gen. Vol. XIX, p. 229, 1889, U. S.**

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful

consideration and ought not to be overruled without cogent reasons;" see **Atty. Gen. XIX, p. 228, 1887, U. S.**

Interpretation put upon statute by the executive entrusted with its enforcement presumed to be correct; see **Atty Gen. Vol. XXII, p. 163, 1898, U. S.**

"The suggestion and the request, coming from the department of state, were practically equivalent to a direction or command; see **Leavitt v. United States, 1888.**

By the act of 1856 a consul cannot exercise diplomatic functions without authorization from president; see **Otterbourg's Case, 1869, U. S.**

"By affixing his signature to an act or a treaty containing such phrase, the president does not effect any change in the constitution;" see **Atty. Gen. Vol. VII, p. 276, 1855, U. S.**

In applying the statutes the president must take into consideration the other statutes which might conflict and the nature of the consuls duties; see **Atty. Gen. Vol. VII, p. 267, 1855, U. S.**

Application of the act of 1855; see **Atty. Gen. Vol. VII, p. 242, 1855, U. S.**

Consuls, subject to regulations issued by the proper head of department; see **Atty. Gen. Vol. VII, p. 249, 1855, U. S.**

(E.) Regulations and jurisprudence relating to consular fees

Protection of individuals against payment of consular fees not due; see **De Lema v. Haldimand, 1824, G. B.**

Determination of official fees; see **United States v. Eaton, 1898, U. S.**

Determination of official fees as distinguished from unofficial fees; see **United States v. Mosby, 1889, U. S.**

British court declared that a consul may not recover fees in a case where he acted for his government; see **De Lema v. Haldimand, 1824, G. B.**

The fees taken for the acknowledgment of an affidavit, etc., are not official; see **United States v. Badeau, 1887, U. S.**

The department of state must determine what constitutes an official fee; see **United States v. Badeau, 1887, U. S.**

A consul may recover before the final settlement, fees paid in under the impression that they belonged to the government; see **United States v. Owen, 1891, U. S.**

Amount of fees which consuls might formerly retain; see **Atty. Gen. Vol. XII, p. 527, 1868, U. S.**

Fees and accounts of consular agents; see **Atty. Gen. Vol. XII, p. 100, 1866, U. S.**

Regulations governing fees of American consuls; see **Atty. Gen. Vol. VII, p. 258, 1855, U. S.**

Classification of fees; see **Atty. Gen. Vol. VII, p. 260, 1855, U. S.**

Fees received by a consul for care of an estate are official fees; see **United States v. Slocum, 1836, U. S.**

The president has power by statute to prescribe a tariff of fees for official services only. He also has the power to declare what are official services. Hence when he perscribes a certain fee for a service it is to be considered as declared official; see **Atty. Gen. Vol. XIX, p. 198, 1888, U. S.**

"Fees for certificates to consular invoices may be rendered official by executive order, and specially included in the tariff of official fees;" see **Atty. Gen. Vol. XIX, p. 229, 1889, U. S.**

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectfull consideration and ought not to be overruled without cogent reasons;" see **Atty. Gen. XIX. p. 228, 1889, U. S.**

Amount of consular fees allowed to consular agent and consul.—Interpretation put upon statute by the executive entrusted with its enforcement presumed to be correct; see **Atty. Gen. Vol. XXII, p. 163, 1898, U. S.**

Fees of consuls for the care of estates; see **Atty. Gen. Vol. VII, p. 255-259, 1855, U. S.**

A consul in China is entitled to fees collected for shipping and discharging seamen on foreign built vessel sailing under the American flag; see **Goldsborough v. United States, 1889, U. S.**

Where consul seeks to recover fees for certifying invoices of non-dutiable goods there must be certainty in the number of such invoices else claim irrecoverable; see **Goldsborough v. United States, 1889, U. S.**

American consul removed from office before the end of the fiscal year is only entitled to retain a part of the fees collected proportional to the part of the fiscal year which he has held office; see **Marston v. United States, 1896, U. S.**

(Syllabus) If the president directs the collection of fees illegally, the owner may have a right of recovery against the government; but the officer who performs the service and collects the fees has no claim to the money; see **Stahel v. United States, 1891, U. S.**

(F.) Relations of different departments

The attorney-general declared that in a judicial case in which there was a conflict between the department of state and

the district court as to the meaning of the word "destitute" contained in the statute, it should be settled by the courts; see **Atty. Gen. Vol. XIX, p. 25, 1887, U. S.**

Conflicts between different departments of the government; see **Atty. Gen. Vol. XIX, p. 25, 1887, U. S.**

Power to provide salary of consul is in congress and an advance in salary made by executive uncollectible; see **Byers v. United States, 1887, U. S.**

(G.) Means to compel consul to discharge his duties.

Responsibility of consul towards individuals; see **(The) Atlantic, 1849, U. S.; Gould v. Staples, 1881, U. S.; Jordan v. Williams, 1851, U. S.**

Consul may refuse to do certain acts where fee exacted is not official fee; see **Mosby v. United States, 1888, U. S.**

Liability of consul for misappropriation of wages of seamen; see **Hindsgaul v. (The) Lyman D. Foster, 1898, U. S.**

Recovery of seamen of charges for their imprisonment at the order of the consul; see **Chester v. Benner, 1871, U. S.**

It is an indictable felony for consul not to pay a draft lawfully drawn upon him for public moneys in his hands; see **Atty. Gen. Vol. VII, p. 257, 1855, U. S.**

The discretionary power given by statutes to consuls regarding the discharge of seamen is not reviewable except by some competent court; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

Where consul collects extra wages from master the secretary of the treasury can only review the arithmetical accuracy of account; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

"Attestation is not necessary to a consular bond;" see **Atty. Gen. Vol. I, p. 378, 1820, U. S.**

(H.) Responsibility of government for acts of consul

See also **Official Acts.**

United States is not responsible for acts done by the consul in so far as he may have exceeded his authority; see **Atty. Gen. Vol. VI, p. 626, 1854, U. S.**

A consul who purchased articles as suggested in a letter from a representative of the department of state is entitled to payment even though the appropriation made for that purpose be exhausted; see **Leavitt v. United States, 1888, U. S.**

"United States is not liable to its citizens for the conse-

quences of the wrongs or shortcomings of its officers;" see **Atty. Gen. Vol. XIX, p. 24, 187, U. S.**

United States is not responsible for a contract made by consul for services; see **Asogue v. United States, 1891, U. S.**

In an action brought against the United States for wages for services, court of claims held that the consul's agreement with plaintiff did not make the United States a party to the contract; see **Asogue v. United States, 1891, U. S.**

MUNICIPAL LEGISLATION[1]

Responsibility of consul for his official acts; see **Jordan v. Williams, 1851, U. S.**

A consul is not responsible for money paid clerk under direction of state department; see **United States v. Owen, 1891, U. S.**

Consuls bring suit against master for refusal to take seamen on board; see **Matthews v. Offley, 1837, U. S.**

American consul abroad has no privilege of jurisdiction and may be sued in American courts; see **Caldwell v. Barclay, 1783, U. S.**

Consul is presumed to have an official character for the performance of certain acts without proof of his signature; see **St. John v. Croel, 1843, U. S.**

Proof of the consular seal; see **Church v. Hubbard, 1804, U. S.; St. John v. Croel, 1843, U. S.**

Suit to compel master to deposit ship's papers; see **Toler v. White, 1834, U. S.**

"Masters of American vessels are subject to prosecution in the name of the consul for omission to deposit with him the papers according to law, but not to indictment;" see **Atty. Gen. Vol. VII, p. 395, 1855, U. S.**

State court decides as to the legality of an oath administered by a consul; see **Seidel v. Peschkaw, 1859, U. S.**

The discretionary power given by statute to consuls regarding the discharge of seamen is not reviewable except by some competent court; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

Where consul collects extra wages from master the secretary of the treasury can only review the arithmetical accuracy of account; see **Atty. Gen. Vol. XVI, p. 268, 1879, U. S.**

[1] Municipal legislation and jurisprudence to compel nationals to conform to the consular regulations and to facilitate the fulfilment by consuls of their functions.

A consul who purchased articles as suggested in a letter from a representative of the department of state is entitled to payment even though the appropriation made for that purpose be exhausted; see **Leavitt v. United States, 1888, U. S.**

Lord Hardwiche said he considered a consul a land or sea officer in the service of his majesty and he would not therefore grant the application that he, when plaintiff, must give security to answer costs according to the course of the court; see **Colebrook v. Jones, 1751, G. B.**

When American consul suspected the papers of a ship to be fraudulent he called upon a vessel of war of his nation to seize it; see **Atty. Gen. Vol. III, p. 405, 1839, U. S.**

ESTABLISHMENT OF CONSULS

Discussion of what establishment of a consul depends upon; see **Arnold v. (The) United Insurance Company, 1800, U. S.**

The appointment of a consul at Port-au-Prince would have the effect, according to international usage, of placing the Haytian empire in diplomatic relations with the United States; see **Atty. Gen. Vol. VII, p. 250, 1854, U. S.**

Consuls of the North German Union recognized as consuls for any of the separate states; see **(Ex parte) Newman, 1871, U. S.**

The grant of the exequatur is not retroactive in its effect; see **(The) Adolph, 1851, U. S.**

The appointment of vice-consul by a consul and the making of emergency appointments; see **United States v. Eaton, 1898, U. S.**

The terms of the exequatur should be consulted to ascertain the territorial limits within which the consul may perform certain functions; see **Atty. Gen. Vol. VIII, p. 102, 1856, U. S.**

Limits within which consul may exercise certain functions; see **Atty. Gen. Vol. VIII, p. 102, 1856, U. S.**

Court declared that the old practice allowing the swearing of affidavits before notaries was still in force in a case where no British consul and no notary or other official present before whom it could have been sworn was within many hundred miles; see **(In re) Darling, 1845, G. B.**

Consul's commission usually directed to the sovereign of the receiving state; see **Barbuit's Case, 1737, G. B.**

Functions of consuls as recited in the commission; see **Barbuit's Case, 1737, G. B.**

ESTABLISHMENT

Form of commission of a consul of Oldenburg given; see **Vivesah v. Becker, 1814, G. B.**

Grant of the exequatur of the consul of Oldenburg by notification in the London Gazette of March 12, 1814; see **Vivesah v. Becker, 1814, G. B.**

"I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person cannot possibly have any virtue in him as a public officer;" see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

Consul general for Scotland appointed deputies; see **Dree Gebroeders v. Vandyk, 1802, G. B.**

Consul appoints a successor and asks the chargé d'affaires to ask for his exequatur; **Sturgis v. Slacum, 1836, U. S.**

TERMINATION

The president has the undoubted power in his discretion to withdraw the exequatur of any foreign consul; see **Atty. Gen. Vol. VII, p. 385, 1855, U. S.**

Consul is not entitled to immunities after his dismissal by sending state, even though his exequatur has not been withdrawn; see **Marshall v. Critico, 1806, G. B.**

In the case of The Hope consul seems to have remained in the enemy's territory after the outbreak of hostilites; see **(The) Hope, 1813, G. B.**

The consul's privileges must be accorded as long as his exequatur is not withdrawn; see **United States v. Trumbull, 1891, U. S.**

Payment of funeral expenses of deceased American consul; see **Atty. Gen. Vol. II, p. 521, 1832 U. S.**

A consul's office was abolished by the disappearance of the sovereignty from which he had received his exequatur; see **Mahoney v. United States, 1869, U. S.**

Consul may cease to be a consul before his exequatur has been withdrawn; see **Hall v. Young, 1825, U. S.**

NATURE OF CONSULAR OFFICE

See **Barbuit's Case, 1737, G. B.; Clark v. Cretico, 1806, G. B.; Courtney, 1810, G. B.; Davis v. Leslie, 1848, U. S.; Gittings v. Crawford, 1838, U. S.; Gernon v. Cochran, 1804, U. S.; Heathfield**

v. Chilton, 1767, G. B.; Herzogin Marie, 1861, G. B.; (The) Infanta, 1848, U. S.; (In re) Kaine, 1852, U. S.; Marshall v. Critico, 1808, G. B.; Seidel v. Peschkaw, 1859, U. S.; State v. De La Foret, 1820, U. S.; United States v. Lucinario, 1906, U. S.; Wilhelm Frederick (especially the argument of counsel who was Phillimore), 1823, G. B.

(A.) Various opinions of the nature of the consular office

Representative character of consuls and cases in which courts speak of consuls as representatives; see **(The) Courtney, 1810, G. B.; Davis v. Leslie, 1848, U. S.; (The) Herzogin Marie, 1861, G. B.; (The) Infanta, 1847, U. S.; Marshall v. Critico, 1808, G. B.; Seidel v. Peschkaw, 1859, U. S.; (The) Wilhelm Frederick, 1823, G. B.**

Authorities whose writings have influenced English judicial opinion of the character of consuls; see **Barbuit's Case, 1737, G. B.; Heathfield v. Chilton, 1767, G. B.**

A consul is not merely a commercial agent; see **Atty. Gen. Vol. VI, p. 20, 1854, U. S.**

A consul is a magistrate and derives authority from both governments; see **Scanlan v. Wright, 1833, U. S.**

That a consul has a certain magisterial character is shown by the decision; see **(In re) Daly, 1841, G. B.**

A consul is not a magistrate; see **Davy v. Maltwood, 1841, G. B.**

A consul is not a judicial officer; see **Waldron v. Coombe, 1810, G. B.**

A consul has certain judicial functions; see **Barbuit's Case, 1737, G. B.**

The difference between a consul and diplomatic agent is indicated in the case of **Von Thodorovich v. Franz Josef Beneficial Association, 1907, U. S.**

Consuls replace state officials for the performance of certain acts as for taking acknowledgment of deeds; see **St. John v. Croel, 1843, U. S.**

Consuls carry out provisions of state laws when certifying to the official character of officials of the receiving state; see **(Succession of) Wedderburn, 1841, U. S.**

"If the attestation of the signature, and right of the person who administered the oaths, were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *prima facie* evidence, though not under the great seal of the state;" see **Stein v. Bowman, 1839, U. S.**

"If, indeed, being a subject of the state, he has power as a local magistrate to solemnize marriage, or, being a foreigner, he has the same power as clergyman, he may do it, but, in either case, not in his capacity as consul; see **Atty. Gen. Vol. VII, p. 343, 1855, U. S.**

Consul of Oldenburg charged with the duty of looking after prizes and nationals detained as prisoners of war and making the necessary intercessions before the proper tribunals to procure them their liberty; see **Viveash v. Becker, 1814, G. B.**

Consul's functions "are purely of a commercial nature, and such as properly belonging to a consul, those of advice and intercession and there is no one function of state purposed to be performed by him as representing the sovereign of his state;" see **Viveash v. Becker, 1814, G. B.**

"American consul has no authority except what may be expressly granted by a law of congress, and acknowledged by the government in whose jurisdiction he resides;" see **Atty. Gen. Vol. XIX, p. 197, 1888, U. S.**

Consuls are not public ministers but enjoy certain privileges such as for safe conduct; see **Viveash v. Becker, G. B.**

"I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person cannot possibly have any virtue in him as a public officer;" see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

It may be that the laws of a state of the United States give validity to certain services performed by consuls; see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

The value of unofficial services customarily performed by consuls depends entirely upon the fact that the person rendering them is a consular officer; see **Atty. Gen. Vol. XX, p. 92, 1891, U. S.**

The efficacy of the act may be due to the faith generally reposed in consular officers; see **Atty. Gen. Vol. XX, p. 93, 1891, U. S.**

Extent to which a consul representing an other consul withdrawn by reason of war is a consul of the belligerent state; see **Atty. Gen. Vol. XXII, p. 75, 1898, U. S.**

"A correspondence ensued between the captain general of Cuba and Mr. Trist, (United States consul), which terminated in a friendly disposition of the question, whether the seizure of the vessel in the port of Havana was a violation of the jurisdictional rights of Spain;" see **Atty. Gen. Vol. III, p. 406, 1839, U. S.**

"Supported by such authorities, I think it may be safely assumed that a consul is not a public minister within the meaning of our act, (act of April 30, 1790) which is that of the general law of nations;" see **Atty. Gen. Vol. I, p. 409, 1820, U. S.**

Whether a consul is or is not a public minister may be a mere dispute about words, in the abstract, but in relation to our act of congress (April 30, 1790,) the question becomes a material question of things, and not merely of words; see **Atty. Gen. Vol. I, p. 409, 1820, U. S.**

Insults offered by a tumultuous crowd to the consul before his residence are not covered by the act of April 30, 1790, which punishes for any infraction of the laws of nations, by offering violence to the person of an ambassador or other public ministers as consul is not a public minister; see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

Consul made chargé d'affaires becomes invested with full diplomatic privileges, "yet becomes so invested as chargé d' affaires not as consul, and the fact of such casual duplicature of functions does not change the legal status of consuls, whether they be regarded through the eye of the law of nations or that of the United States;" see **Atty. Gen. Vol. VII, p. 345, 1855, U. S.**

Marshals are not required by law to execute the sentence of a French consul, arising under the 12th article of the convention with France; see **Atty. Gen. Vol. I, p. 43, 1794, U. S.**

Consuls are not public ministers and are not invested with any representative character; see **Atty. Gen. Vol. I, p. 42, 1794, U. S.**

Elevated character of the consular office; see **Oscanyan v. Arms Co., 1880, U. S.**

Official character of consul's acts when ordering survey of vessel and sale at auction. Like a trustee he is inhibited from acquiring an interest in the property; see **Riley v. The Obell Mitchell, 1861, U. S.**

A vice and deputy consul has authority to acknowledge a power of attorney; "for while he acted in that capacity he was entitled to exercise the authority vested by law in the consul himself;" see **Brown v. Landon, 1883, U. S.**

Lord Hardwiche said he considered a consul a land or sea officer in the service of his majesty and he would not therefore grant the application that he, when plaintiff, must give security to answer costs according to the course of the court; see **Colebrook v. Jones, 1751, G. B.**

"It cannot be conceived that the general government sends

representatives abroad for the purpose of acting as the executive officers of the different state courts in the Union. It is true that those representatives sometimes act as ministerial officers of such courts, as for instance, to procure testimony, and the like; but they do so with the special authority of state legislation, providing distinctly for such cases;" see **Interdiction of Joseph Dumas, 1880, U. S.**

"Or, in the absence of such person by the official representative of the foreign government;" see **Grin v. Shine, 1902, U. S.**

"A consul of the United States is authorized to take at his consulate an acknowledgment of a deed to realty situated in this state, and his certificate, under official seal, is evidence of such acknowledgment;" see **Long v. Powell, 1904, U. S.**

Mexican consul makes complaint under oath to secure extradition. His official character must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him in its behalf; see **Ornelas v. Ruiz, 1895, U. S.**

Nature of American consul's action when administering an estate; see **Sturgis v. Slacum, 1806, U. S.**

In the course of the administration of an estate the French consul was entitled to be heard by the court, not as a party but informally, as the national agent of supposedly interested parties; see **Ferrie v. The Public Administration, 1855, U. S.**

Consul even though sometimes allowed to engage in commercial pursuits, is so far the public agent of his state and its "commercial representative that he is precluded from undertaking any affairs or assuming any position in conflict with its interests or its policy;" see **Oscanyan v. Arms Company, 1880, U. S.**

Consul is a representative of the United States within the meaning of the act of 1853 and hence has authority to administer an oath; see **Seidel v. Peschkaw, 1859, U. S.**

"By all governments his [the consul's] representative character is recognized and for that reason certain exemptions and privileges are granted him;" see **Oscanyan v. Arms Company, 1880, U. S.**

Character of the consular office; see **Seidel v. Peschkaw, 1859, U. S.**

(B.) Whether consul is a functionary of the receiving state as well as of the sending state

Consul derives his authority also from receiving state; see **Scanlan v. Wright, 1833, U. S.**

A consul is not a functionary of the receiving state; see **Herman v. Herman, 1825, U. S.**

Mansfield discusses the nature of the consul's act when he sells damaged goods in receiving state and compares him to an auctioneer; see **Waldron v. Coombe, 1810, G. B.**

Consul is an agent of the receiving state (Brazil) directed by laws to sell damaged goods; see **Waldron v. Coombe, 1810, G. B.**

Laws of receiving state have no control over consul's expenditure of money and citizens of receiving state are not concerned with abuses relating to fees charged; see **Commonwealth v. Di Silvestro, 1906, U. S.**

When a consul administers an estate he is not an ordinary administrator but acts as receiver or agent and his duties are prescribed by law; see **Sturgis v. Slacum, 1836, U. S.**

Case in which court declared that consul has no right to receive fees when acting upon instructions from his government; see **De Lema v. Haldimand, 1824, G. B.**

Court admits affidavits taken before British consul in Russia because magistrates of Russia are not empowered to take affidavits; see **(In re) Daly, 1841, G. B.**

List of the arrival of ships sent home by consuls are mere representations and cannot be received as evidence; see **Roberts v. Eddington, 1801, G. B.**

The consul's action when caring for estates looking after the interests of owners in prize proceedings is of the nature of surveillance and is not judicial; see **Atty. Gen. Vol. VIII, p. 101, 1856, U. S.**

Representative character of consul when asking for the delivery of prisoners to be transported to the sending state for trial; see **Atty. Gen. Vol. VIII, p. 76, 1856, U. S.**

Consuls are not judicial officers; see **Atty. Gen. Vol. VIII, p. 381, 1857, U. S.**

Court declared that the old practice allowing the swearing of affidavits before notaries were still in force in a case where no British consul was within 150 miles; see **Cooke v. Wilby, 1884, G. B.**

The British court received an acknowledgment, the affidavit verifying the same having been sworn to before the provisional British consul and no notary or other official present before whom it could have been sworn being within many hundred miles; see **(In re) Darling, 1845, G. B.**

Court declares that it has no authority to compel witnesses

to testify before Spanish consul; see **Spanish Consul's Petition, 1867, U. S.**

"American consul has no authority except what may be expressly granted by a law of congress, and acknowledged by the government in whose jurisdiction be resides;" see **Atty. Gen. Vol. XIX, p. 197, 1888, U. S.**

(C.) Definition

"A consul is an officer comissioned by his government for the protection of its interests and those of its citizens or subjects;" see **Oceanyan v. Arms Company, 1880, U. S.**

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